IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 70

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANT'S BRIEF.

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INDEX.

	PAGE
Opinions Below	1
Statement as to Jurisdiction	2
Statement of the Case	3
Specification of Errors	17
Argument	19
I. The Order of the Commission is Violative of Fundamental Principles of Statutory Construction, Wholly Disregards the Legislative Standards Prescribed by the Congress, and Deprives Appellant of Rights Granted by Statute	19
(a) Grandfather Clause of Motor Carrier Act, 1935, Is a Grant of Statutory Rights	19
(b) The Act Is Remedial in Character and Must Be Liberally Construed in Order to Preserve the Position of Carriers Such as Appellant in the National Transportation System	20
(c) Ultimate Ascertainment of the True Meaning and Intent of the Grandfather Clause Is Within the Province of This Court and the Commission's Views Are Not Controlling	21
(d) The Grandfather Provision of the Act as Construed and Applied by This Court Requires the Granting of a Certificate to Appellant as a Matter of Law. The Contrary Result Imposed by the Commission's Order Would Curtail the Effectiveness of the Motor Carrier Act	22
(e) The Order in Effect Reads Out of the Statute the Expression "Any other Arrangement" and the Reference to "Motor Vehicle Operations of Carriers by Rail"	26
(f) The Order Operates to Read Into the Act Legislative Standards Not Prescribed by the Congress	28

(g) The Background and Legislative History of Motor Carrier Act, 1935, Establish That Appellant Comes Within the Class Intended by Congress to Be Granted Grandfather Rights 31

(h) The Ordinary Broad Meaning of the Term "Arrangement" as Applied by the Courts and the Commission Confirms Appellant's Claim for Grandfather Rights Here..... 35

(i) The Commission's Conclusion Also Involves a Misinterpretation of the Contracts, a Disregard of the Evidence and Assumed Facts Not of Record..... 38

(j) Denial of Grandfather Rights to Appellant Cannot Be Reconciled With Subsequent Orders of the Entire Commission Granting Grandfather Rights to Other Railroads Arising From a Similar Form of Auxiliary and Supplemental Rail and Motor Service Arranged for Under Substantially Identical Contracts 47

(k) The Commission's Administration of the Grandfather Clause of Motor Carrier Act, 1935, Is Lacking in Uniformity and Has Discriminated Against Appellant and Arbitrarily Deprived Him of Valuable Rights... 54

The Order Deprives Appellant of Rights and Property Without Due Process of Law. It Is Based Upon a Disregard of Undisputed and Controlling Facts, Is Without Support in the Evidence and Based in Part Upon Assumed Facts Not in Evidence and Is Not Supported by Essential Findings of Fact..... 62

(a) By Disregarding and Failing to Give Due Legal Effect to Appellant's Undisputed Showing of Bona Fide and Continuous Coordinated Motor Carrier Service the Commission Denied Appellant's Rights Without Due Process of Law..... 62

(b) The Conclusion in the Report That the Operations Were Those of the Contractors as Common Carriers in Their Own Right Is Based Upon Asserted Facts Outside the Record and Unsupported by Proof 65

(c) The Order Is Devoid of Findings Essential to Support the Erroneous Conclusion That Appellant's Motor Vehicle Service Was Being Furnished by the Contractors as Common Carriers in Their Own Right 67

Conclusion 69

Appendix I 71

Appendix II 84

STATEMENT OF CASES.

Alton R. Co. v. United States, 287 U. S. 229..... 21
Alton R. Co. v. United States, 315 U. S. 15..... 26
Ann Arbor R. Co. v. United States, 281 U. S. 658..... 21
Arizona Grocery v. Atchison Railway, 284 U. S. 370.. 21
Assigned Car Cases, 274 U. S. 564..... 54
Atchison etc. Ry. Co. v. United States, 284 U. S. 248.. 21
Atchison Ry. v. United States, 295 U. S. 193, 201..... 69
Baltimore & Ohio R. R. v. United States, 277 U. S. 291. 21
Bird v. United States, 187 U. S. 118..... 25
Bluefield Water Works Co. v. Public Service Commission, 262 U. S. 679..... 64
Boston & Maine Transp. Co. Common Carrier Application, 34 M. C. C. 599.....47, 53, 57
Boston & Maine Transp. Co. Common Carrier Application, 30 M. C. C. 697.....56, 57
Boston Fruit & Produce Exc. v. New York & N. E. R. R. Co., 4 I. C. C. 664..... 35
Brimstone R. R. Co. v. United States, 276 U. S. 104... 21
Brown Lumber Co. v. L. & N. R. Co., 299 U. S. 393...21, 38
Chicago & North Western Ry. Co. Common Carrier Application, 31 M. C. C. 299..... 1
Chicago Junction Case, 264 U. S. 258.....64, 66
Coordination of Motor Transportation, 182 I. C. C. 263 6
Crooks Term. Warehouse, Inc., Cont. Car. Application, 34 M. C. C. 679.....42, 43, 47, 51, 54, 55
Crooks Term. Warehouse, Inc., Contr. Car. Application, 27 M. C. C. 39..... 51
Fullerton Co. v. Nor. Pacific, 266 U. S. 435..... 23
Georgia Commission v. United States, 283 U. S. 765.. 54

Great Northern Ry. v. Delmar Co., 283 U. S. 686.....21, 38
Great Northern Ry. v. Merchants Elev. Co., 259 U. S. 285..... 38
Great Northern Ry. v. Sullivan, 294 U. S. 458..... 27
Gregg Cartage Co. v. United States, 316 U. S. 74..... 21
Harrison v. Northern Trust Co., 317 U. S. 476..... 31
Interstate Commerce Com. v. Louisville & Nashville R. R., 227.....63, 66
Interstate Commerce Commission v. Nor. Pac. Ry., 216 U. S. 538..... 21
Interstate Commerce Com. v. Oregon-Wash. R. & Nav. Co., 288 U. S. 14..... 21
Interstate Commerce Com. v. Union Pacific R. R., 222 U. S. 541..... 63
Iselin v. United States, 270 U. S. 245..... 30
Kansas City S. Transport Co., Inc., Com. Car. Application 10 M. C. C. 221..... 58
McDonald v. Thompson, 305 U. S. 263..... 20
Missouri Pacific R. Co. Common Carrier Application, 22 M. C. C. 321.....16, 26, 42, 49, 56, 58
Missouri Pacific R. R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366..... 46
Morgan v. United States, 298 U. S. 468..... 64
Motor Bus and Motor Truck Operation, 140 I. C. C. 685 6
Ohio Bell Telephone Co. v. Com'n, 301 U. S. 292..... 65
Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510..... 64
People v. American Ice Co., 120 N. Y. Supp. 443..... 35
Peoria Ry. Co. v. United States, 263 U. S. 528..... 21
Piedmont & Northern Ry. v. Commission, 286 U. S. 299 20
Powell v. United States, 300 U. S. 276..... 21
R. R. Com'n v. Pacific Gas Co., 302 U. S. 388..... 64

Robinson v. B. & O. R. R., 222 U. S. 506 66
St. Joseph Stock Yards v. U. S., 298 U. S. 38 64
St. L. & O'Fallon R. Co. v. United States, 279 U. S. 461 21
Scott Bros., Inc., Collection and Delivery Service, 4 M. C. C. 551 ..... 36, 56
Scott Bros., Inc., Collection and Delivery Service, 2 M. C. C. 155 55
Securities & Exchange Com. v. Chenery Corp., 318 U. S. 80 68
Shwab v. Doyle, 258 U. S. 529 23
Southern Pac. Co. v. Interstate Commerce Comm., 219 U. S. 433 27
Southwestern Bell Tel. Co. v. Public Service Com., 262 U. S. 276 64
Standard Oil Co. of New York v. United States, 179 Fed. 614 35
State of Florida v. United States, 282 U. S. 194, 215 ... 69
Sun Insurance Office v. Be-Mac Transport Co., 132 Fed. (2d) 535 ..... 43, 46
Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U. S. 266 21
United States v. Abilene & Southern Ry. Co., 265 U. S. 274 ..... 63, 66
United States v. American Trucking Association, 310 U. S. 534 ..... 21, 31, 51
United States v. B. & O. R. R., 293 U. S. 454 69
United States v. Carolina Carriers Corp., 315 U. S. 475 ..... 19, 20, 21, 23, 26, 28, 30, 62, 68
United States v. Chicago M. St. P. & P. R. Co., 294 U. S. 499, 504 69
United States v. Idaho, 298 U. S. 105 21
United States v. Maher, 307 U. S. 148 21

United States v. N. Y. Central R. R., 263 U. S. 603.... 21
United States v. Powers, 307 U. S. 214..... 25
United States v. Rosenblum Truck Lines, 315 U. S. 50. ..... 19, 21, 23, 62
Virginian Ry. v. United States, 272 U. S. 658..... 53
Wallace v. Cutten, 298 U. S. 229..... 30
Western Chemical Co. v. United States, 271 U. S. 268.. 53
Wichita R. R. Co. v. Public Utilities Commission, 260 U. S. 48, 50..... 69
William Danzer Co. v. Gulf R. R., 268 U. S. 633..... 23

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANT'S BRIEF.

Opinions Below.

The District Court, without delivering a written opinion or memorandum discussing the cause, entered findings of fact and conclusions of law as a basis for its judgment (R. 150-2) which sustained a report and order by Division 5 of the Interstate Commerce Commission, hereinafter referred to as the Commission, entered under date of November 26, 1941, in a proceeding known as Docket No. MC 42614 and reported as *Chicago & N. W. Ry. Co. Common Carrier Application*, 31 M. C. C. 299 (R. 15-24).

For the Court's convenience this report is attached hereto as Appendix I. Rehearing later was denied by order of the entire Commission not accompanied by official report (R. 24-25).

Statement as to Jurisdiction.

This Court under date of June 14, 1943, noted probable jurisdiction in this case.

This is a direct appeal from a final decree by a specially constituted three-judge United States district court dismissing appellant's petition to set aside the above mentioned order which denied appellant's application under the so-called "grandfather clause" of section 206 (a) and under section 207 (a) of Motor Carrier Act, 1935 (49 Stat. 543, 551; 49 U. S. C., sec. 306 (a) and 307 (a)), for operating authority as a common carrier by motor vehicle.

The three-judge district court was convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 219-220, 28 U. S. C., sec. 41 (28), 43-48, 45a, and 47 (a)) and section 205 (h) of the Motor Carrier Act, 1935 (49 Stat. 550), rearranged by the Transportation Act of 1940 (54 Stat. 922) as section 205 (g) of Part II of the Interstate Commerce Act, which now includes Motor Carrier Act, 1935 (54 Stat. 919; 49 U. S. C., sec. 305 (g)).

Statutory provisions sustaining jurisdiction in this Court are the above mentioned provisions of the Urgent Deficiencies Act of 1913, particularly (28 U. S. C., secs. 47 and 47a) and section 238 of the Judicial Code as amended (28 U. S. C., sec. 345).

This appeal presents important questions of law as to the construction and application of the Motor Carrier Act, 1935, particularly sections 203 (a) (14), 206, and 207. The three sections just cited are in order stated 303 (a) (14),* 306, and 307 of Title 49, U. S. Code, but for con-

* This section as it now appears in the U. S. Code is an amendment. The original section of the Motor Carrier Act is the one with which we are here concerned. (See *post*, p. 23.)

venience will be referred to herein as sections 203 (a) (14), 206, and 207, since the reports of the Commission and the decisions of the courts commonly use that reference. These statutory provisions, so far as material, are set forth at length in connection with the argument herein.

Appellant asserts that the Commission by its order misconstrued and misapplied these provisions of the Motor Carrier Act; that the order of the Commission and the judgment of the District Court therefore deprive him of Federal statutory rights; and that the order and judgment violate rights guaranteed to appellant by the due process clause of the Fifth Amendment of the Constitution of the United States.

Statement of the Case.

This appeal presents only questions of law. The essential facts of record are undisputed and uncontradicted.*

This is the first case to come before this Court wherein a long-established common carrier by rail asserts "grandfather" operating rights with respect to freight traffic transported between certain of its freight stations by motor vehicles operated upon the highways, as an auxiliary or supplement to the carriers' rail service, at rates and charges named in its railroad tariff schedules duly published and filed with the Commission, with specific provision therein, authorizing carriage of such traffic over part of its routed movement by such motor vehicles.

Appellant is the Trustee of the property of the Chicago and North Western Railway Company, hereinafter referred to as the Railway, which has been since June 28, 1935, and still is under the jurisdiction and control of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a reorganization

*The substance of the entire record before the Commission was introduced and received in evidence in the court below. (R. 41-44, 147.)

proceeding under section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy. Appellant on July 20, 1939, succeeded a predecessor trustee. The Railway has an extensive mileage in nine western states and is one of the largest carriers of freight in less than carload lots, commonly known as merchandise freight, in the territory within which it operates (R. 85). The Railway for nearly a hundred years has been and presently is serving the public as a common carrier by railroad. (R. 52-54).

The motor carrier operations on the basis of which appellant asserts his claim of right to a certificate of convenience and necessity were started by the Railway prior to the so-called grandfather or critical date of June 1, 1935—some as early as 1931—and have been carried on continuously up to and including the present (R. 5-6). These operations are not inter-connected or inter-dependent. Territorially, they are in many instances widely separated. Each operation was designed and is used to expedite the movement of merchandise rail freight in a local territory through use of motor vehicles moving it over the highways between certain of the Railway's freight houses at the beginning or at the end of the Railway's movement of it from or to the local territory in railroad cars. The several routes, mileages and dates when the operations were instituted are shown in the following table (Ex. 1 of Ex. 1-A,* R. 52, 44, 136):

* The six exhibits received in evidence at the hearing before the Commission were received in evidence in the court below (R. 44) as Exhibit 1-A.

Route No.	Explanation of Route Numbers	Distance Miles	Date Started
1	Between St. Charles and Geneva, Ill.	2	Aug. 31, 1933
2	Between Rochelle and Creston, Ill.	5	May 1, 1935
3	Between Rochelle and Ashton, Ill.	11	May 1, 1935
4	Between Dixon and Franklin Grove, Ill.	10	May 1, 1935
5	Between DeKalb and Malta, Ill.	11	May 1, 1935
6	Between Council Bluffs, Ia., and Omaha, Neb.	4	July 7, 1931
7	Between Wausau and Rothschild, Wis.	5	Nov. 10, 1933
8	Between Hurley, Wis., and Ironwood, Mich.	1	Oct. 23, 1934
9	Between Marinette, Wis., and Menominee, Mich.	2	Sept 14, 1933
10	Between Marinette, Wis., and Escanaba, Mich.	52	Jan. 15, 1935
11	Between Sheboygan and Green Bay, Wis.	65	June 25, 1934
12	Between Fond du Lac and Green Bay, Wis.	71	June 25, 1934
13	Between Green Bay and Clintonville, Wis.	62	Mar. 25, 1935
14	Between Green Bay, Wis., and Menominee, Mich.	56	June 25, 1934
15	Between Deadwood and Lead, S. Dak.	2	Oct. 1, 1933
17	Between Proviso and Woodstock, Ill.	48	May 17, 1933
18	Between Proviso and Algonquin, Ill.	32	May 17, 1933
19	Between Proviso and DeKalb, Ill.	48	July 9, 1934
20	Between Proviso and Belvidere, Ill.	61	Dec. 14, 1931
21	Between Proviso and Waukegan, Ill.	36	Dec. 4, 1931
22	Between Proviso and Chicago, Ill.	14	Dec. 4, 1931
23	Between Proviso and West Chicago, Ill.	19	April 2, 1934

The map, Exhibit 2 of Exhibit 1-A (R. 52, 136A), shows by route numbers and in red color the location of these operations relative to the Railway system, their small mileage in comparison with the system mileage and their obviously auxiliary character. These motor car operations are all conducted upon highways parallel with and closely adjacent to appellant's railway lines (R. 137).

The operations were commenced during a period when the Commission publicly was encouraging carriers by railroad to experiment in supplemental and coordinated rail and motor service.

Prior to the enactment of Motor Carrier Act, 1935, and as early as 1928 the Commission from time to time made investigations and reports to Congress concerning motor vehicle transportation within the United States, the participation of common carriers by railroad therein and the need for Congressional legislation with respect thereto. In such reports the Commission encouraged and approved the use by rail carriers of motor transportation in co-

ordination with, and supplemental to, their rail service, such as that employed by appellant, herein described. Referring to the experimental operations of motor vehicles by railroads the Commission, in 1928, in *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 745, said:

> "Railroads, whether steam or electric * * * subject to the interstate commerce act, *should be authorized to engage in interstate commerce by motor vehicles on the public highways*, * * *." (Emphasis supplied.) (R. 4.)

And again in *Coordination of Motor Transportation*, 182 I. C. C. 263, 375, decided April 6, 1932:

> "The Railroads have undertaken to test the possibilities of trucks and other new facilities for use in conjunction with rail service; *their use of trucks in substitution for train service in areas of light traffic has been uniformly beneficial in reducing costs and improving service;* * * *." (Emphasis supplied.) (R. 4.)

In the last mentioned report the Commission noted particularly arrangements of the kind made use of by appellant and his predecessors, as hereinafter described, for obtaining vehicular equipment and therewith rendering common carrier transportation service. The Commission, after noting that highway trucking by rail carriers conducted entirely independent of their rail service is limited and that the preponderance of railroad truck operations is through the means of wholly owned subsidiaries, said (pp. 375-376):

> "*There is also a substantial amount of truck operation under contracts with independent truckers.* For example, the station-to-station service in lieu of local freight trains is quite extensively in use by the New York Central and Pennsylvania, as well as rather extensive terminal operations, such as those at New York and St. Louis." (Emphasis supplied.) (R. 4.)

In the same report in the year 1932 the Commission expressed the conclusion that the rail carriers "should be

encouraged in the use of" transportation by motor vehicles over the public highways "wherever such use will promote more efficient operation or improve the public service" (182 I. C. C. 379), and among its recommendations for legislation was the following (p. 385):

> "That certificates should be issued as a matter of course to bona fide operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the act." (R. 5.)

In the Forty-Sixth Annual Report to the Congress, dated December 1, 1932, the Commission said, at page 21:

> "In our judgment there is great opportunity for the advantageous use of motor trucks and busses to supplement or in substitution for railroad service, and we *welcome* the numerous experiments which are being made in this direction." (Emphasis supplied.) (R. 5.)

In the Fifty-Second Annual Report to the Congress, dated November 1, 1938, the Commission said, at page 13:

> "Many railroads are using trucks in lieu of local way-freight service *with much advantage*." (Emphasis supplied.) (R. 5.)

These motor vehicle operations were instituted after investigation and study on behalf of the Railway (R. 50) at various times during the period when the entire subject of transportation by motor vehicle and proposed regulation thereof was under investigation and consideration by the Commission with a view to possible congressional legislation.

In all material respects the method of operation at present is the same as when the service was first instituted, and consequently reference herein to the present includes the method of operation prior to the critical date of June 1, 1935 (R. 97). Freight, consisting of less-than-carload traffic commonly known as merchandise traffic, instead of moving throughout the entire course of trans-

portation in box cars over appellant's railroad tracks, is transported over adjacent highways by motor vehicle over a part of the way between rail stations of appellant (R. 62-65, 80-1). The freight is thus moved in motor vehicle service which is partially substituted for appellant's rail service, is auxiliary thereto and coordinated therewith (R. 62, 64).

A traffic witness for appellant introduced an exhibit (Exhibit 4 of Exhibit 1-A, R. 61, *et seq.*, 44, 71, 138) showing with respect to each route listed above by months the number of pounds of freight handled during the years 1935 and 1936, aggregating about 98,000,000 during the latter year. The witness testified that the freight handled by means of these motor vehicle operations all moved on railroad billing from point of origin to destination (R. 63, 78). Using way-bills covering numerous typical shipments, he traced them through from origin to destination, showing that they moved a part of the way in conventional railroad service and the remainder by one of these motor vehicle operations. For example, a shipment of 203 pounds of art leather from Newburgh, New York, to St. Charles, Ill., moved via the Erie Railroad to Chicago, and via the Chicago and North Western Railway to St. Charles. It was handled by the Railway's motor vehicle operation from Geneva to St. Charles (R. 63-65). In the same way freight is handled to and from the larger stations designated on the other routes listed above by rail, and between those larger stations and the smaller ones by motor vehicle, as, for example, Chicago to and from DeKalb by rail and by motor vehicle between DeKalb and Malta, which is the next station west of DeKalb (R. 66-7).

Referring by way of a specific example to Route No. 1, St. Charles-Geneva, the traffic witness explained that general merchandise freight had been handled between those points by rail for many years, not only local freight but freight originating and destined to points throughout the

United States. The substitution of the motor service results in the railroad being able to expedite the through service on shipments. All of the motor vehicle routes covered by the application relate to movement by motor vehicles between the Railway's freight stations only and are a substitution for the service which had previously been performed by rail (R. 62-66, 80-81, 121).

No change in rates of any kind was involved and for the complete movement of the shipment from origin to destination the railroad rates as published in the railroad tariffs were assessed in every case. So far as the shipper is concerned, he does not know in a specific instance whether the shipment moves by rail or by motor vehicle, although he is informed by the published tariff that the Railway has the option thus to move it in part by motor vehicle (R. 63, 83, Exhibit 5 of Exhibit 1-A, R. 75, 44, 142, 112-113).

The schedules of the motor vehicle operations are coordinated with the train service schedules. The Railway fixes the time of departure of the motor vehicle and the schedules of the motor vehicle operations are made by the Railway (R. 64, 85-86).

Appellant assumes and retains full responsibility for such freight, as a common carrier thereof, throughout the entire course of its transportation both by rail and by highway. So far as the public is concerned the only transportation agency appearing in the transaction and the only one with whom the shipper or receiver of the freight has a bill of lading contract and to whom he can look in connection with claims and kindred matters is appellant. The accounting in all respects is the same as though the shipments had moved actually all the way by rail and in a box car (R. 114-115).

This plan of operation provides service which is recognized as auxiliary of or supplemental to railroad service, thus producing a new type of common-carrier service with

a single carrier (the Railway) utilizing both forms of transportation to advantage. It differs from service given by a railroad alone or by a motor carrier alone.

Pursuant to this plan, appellant's predecessor, the Railway, in lieu of purchasing and owning motor vehicle equipment, entered into arrangements evidenced by written contracts or agreements with certain possessors of motor-vehicle equipment and personnel referred to as contractors, under which the contractors agreed to furnish such motor trucks of types satisfactory to the Railway and employes to drive them as might be required by the Railway to move freight in its possession as a common carrier between its freight stations in accordance with schedules and instructions to be given by it. The provisions of these contracts (Exhibit 3 attached to complaint, Exhibit 6 of Exhibit 1-A, R. 25-29, 44, 145, 147) are as follows:*

Section 1 (a), eliminating the stations named, reads as follows:

> "The Contractor agrees to provide motor trucks or motor trucks and trailers *of such type as shall be satisfactory* to the Railway Company *for the purpose of transporting certain of the Railway Company's freight between its freight station at Proviso and the freight stations* at the following named points * * * daily, except Sundays and holidays, *in accordance with such schedules and instructions as shall be given by the Railway Company.* The Contractor agrees to *so transport such freight as the Railway Company may designate with the trucks or trucks and trailers aforesaid in a manner satisfactory to the Railway Company.*"

Section 1 (b) provides that the contractor shall employ and direct the drivers, who shall remain the sole employes of the contractor and subject to its control and direction and shall not be the employes of the Railway, "it being the intention of the parties hereunto that the contractor shall be and remain an independent contractor and that nothing

* Throughout the description of this contract and its provisions emphasis is supplied by use of italics.

herein contained shall be construed as inconsistent with that status." The contractor agrees to conduct the work in his own name and not to display the Railway's name upon the vehicles.

Sections 1 (c) and 1 (d) prohibit assignment of the contract by the contractor without the Railway's consent and that the contractor shall not have the exclusive right to transport the described freight "and that the Railway Company shall have the right *to arrange with others for transportation thereof*".

Section 2 provides that on the twentieth day of each month the Railway will pay the contractor at the rate of twenty cents per hundred pounds "of freight so transported * * * *for all services rendered* during the preceding calendar month." "The weights indicated on the waybills of the Railway Company are to furnish the basis for payments hereunder." The contractor is required to give receipts to the Railway for freight delivered to it and upon re-delivery at freight stations the Railway shall furnish the contractor with receipts. Loading and unloading of the freight between station platforms and motor trucks shall be done at the contractor's expense.

By section 3 the contractor agrees to comply with Federal and State laws and municipal ordinances and to indemnify the Railway against any default therein. In section 4 the contractor is made responsible *"to the Railway Company"* for loss, damage and delay to the freight while in the contractor's custody, and in section 5 the contractor agrees to indemnify and save harmless *the Railway* from any liability and claims for such loss, damage and delay, and also on account of loss, damage and personal injury claims generally arising out of or in connection with the performance of the contract by the contractor, its agents or employes. In section 6 the contractor likewise indem-

nifies *the Railway* with respect to claims on account of injuries to or death of the contractor or his employes.

In section 7 the contractor authorizes the Railway to keep in effect during the life of the contract "*for the Railway Company's protection*", public liability and property damage insurance on all of the contractor's vehicles; or in lieu thereof the Railway may take out the insurance and deduct a small chagre from the contractor's compensation to cover the premium.

Section 8 provides that in the event the highways between the railway freight stations become impassable, the contractor shall immediatly notify the Railway "so that it may have as much time as possible within which *to arrange and substitute other service* if it so desires between said stations"—the contractor to resume operations when the highways again become passable and to notify the Railway "so as to enable the Railway Company *to make arrangements for the discontinuance of such other service* with the least inconvenience and expense."

Section 9 provides that either party may terminate the contract by giving ten days' written notice.

The contractors have no contractual arrangements of any kind—bill of lading or otherwise—with shippers or receivers of freight and, consequently are not common carriers in respect of this freight. The Railway formerly received, and now appellant, at all times receives, transports, and delivers the freight as a common carrier and stands in that relation to the shippers and receivers throughout the entire transaction from the receipt of the freight from the consignor to ultimate delivery to the consignee.

The Railway had and appellant has under these "arrangements" direct and complete control of the movement and handling of the freight, which was and is exclu-

sively between appellant's freight stations. The Railway formerly fixed and appellant now fixes the schedules for highway movement to coordinate with rail schedules, designates the amount and particular shipments of freight to be moved, and the contractors were and are obliged to conform to such changes as made from time to time by the Railway and appellant (R. 64, 85-86).

No billing of any kind is issued by the contractors. In actual practice trucks are loaded at stations by employes of appellant, sometimes assisted by the driver. After trucks are loaded a manifest is issued by appellant's employes, which is signed by the driver, and upon delivery of the freight to appellant's freight stations appellant's agent signs the manifest, thus releasing the contractor (R. 78, 80, 83, 108, 134).

After the enactment of Motor Carrier Act, 1935, appellant's predecessor prepared on an appropriate form prescribed by the Commission and within the time allowed filed with the Commission an application claiming grandfather rights on basis of these operations. The Commission hereafter, under date of February 24, 1938, entered an order (Exhibit 2, R. 44, 145, 147) setting the application down for public hearing. The order provided in terms, *inter alia*:

> "That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted." (R. 146.)

None of the so-called contractors having ownership of the vehicular equipment appeared in person or by counsel at the hearing before the Commission on March 28, 1938, with the exception of a representative of a contractor interested in three routes centering around Green Bay, Wis. who testified as a witness. There was no representation of any kind on behalf of contractors furnishing equipment

for the other nineteen routes included in the application. Although the witness stated categorically (R. 134) that he was opposed to the application, his counsel added formally to the record the statement that "Our only interest in this case is to come in so the Commission may know the true facts." Counsel further stated (R. 135):

> "We are interested in continuing on with the operation, of course, as we have in the past. However, we feel it our duty to tell the Commission the facts, and to come in and protect any property rights we might have."

The only evidence of record as to whether the contractors were common carriers or had filed applications was that of one of appellant's witnesses, who, in response to questioning on cross-examination as to whether any of the contractors had filed applications with the Commission under the grandfather clause, stated that he did not actually know of any who had done so (See R. 97, 98). The witness further testified that contractors operating three routes, viz., 12, 13, and 14, are common motor carriers authorized to operate over the highways in Wisconsin (See R. 103-105), but he did not know whether the contractor on Route 11 was a common carrier nor did he know whether contractors as to other routes were common carriers (See R. 104-108).

Representatives of appellant's Executive, Operating and Traffic Departments supported the application with oral testimony and statistical exhibits. In general the essential aspects of this evidence has already been outlined. With respect to the motivating reasons for utilizing motor vehicles for transporting merchandise between appellant's freight stations on the railroad lines here involved, the Assistant to the Chief Executive Officer testified (R. 50) that the Railway as far back as 1925 began investigating and studying the utilization of motor service and its effect upon the Railway's business. As a result of these studies it was developed that motor vehicles advantageously could

be used on the highways by the Railway as an auxilliary means of handling freight traffic for the following reasons:

(1) Such operations make the rail service more flexible, in that more frequent service at more convenient times of the day could be provided than was possible by train service exclusively.

(2) Because of low level of traffic there were many trains no longer carrying sufficient traffic to pay actual out-of-pocket expenses, and yet there was still some traffic that had to be moved. Under those circumstances some trains could be eliminated and replaced by truck operations in certain situations.

(3) Motor Vehicle operations could be used by the Railway to bring about a saving in expenses and provide some kinds of service that could not be afforded by rail alone.

(4) Movement of freight by motor vehicle for relatively short distances made it possible to maintain existing rail service and at the same time eliminate car mileage. This is accomplished by consolidating shipments into a single car terminated and unloaded at one station from which freight is distributed from that station to nearby stations by truck. This also limits the number of stops required of the train, thus permitting the train to make faster time and cover longer distances (R. 54-55).

The Commission in its report and order (R. 15-24) entered under date of November 26, 1941 (Docket No. MC 42614; 31 M. C. C. 299) summarily disposed of appellant's asserted grandfather rights in two paragraphs on page 301 of the report. In so doing the Commission ignored and misinterpreted the undisputed evidence of record, referred to above; based its report on matters not introduced in evidence; arbitrarily discarded legislative standards and directions prescribed by the Congress in Motor Carrier Act, 1935, particularly sections 203 (a)

(14), 206, and 207; and based its order upon insufficient findings of fact.

In the same report, however, the Commission, although it denied the application covering the operations here involved, granted certain applications filed by appellant's predecessor covering the same kind of operations between stations on other parts of the Railway commenced between June 1 and October 15, 1935, subsequent to the critical grandfather date, which operations appellant's predecessor was conducting by use of motor vehicles procured under contracts substantially identical in terms and purport to those already mentioned.

The report of the Commission, which was entered by Division 5, was not unanimous in respect of the denial of appellant's grandfather rights. Of the three Commissioners participating the senior Commissioner, Chairman* Eastman, now Director of the Office of Defense Transportation and formerly Federal Coordinator of Transportation, in a separate expression stated that the grandfather application should be granted rather than denied. Chairman Eastman referred to *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, 333, wherein, concurring in part, he expressed the opinion that under the legislative definition of a common carrier stated in section

* Commissioner Eastman at this time was Chairman of the Commission. The Commission's practice is for the Chairman of the Commission to sit on a Division only as a Commissioner, although the senior Commissioner, in this instance Commissioner Eastman, acts as a presiding Commissioner. Commissioner Eastman was appointed Chairman of the Commission on July 1, 1939, and continued as such until July 1, 1942, when Commissioner Aitchison succeeded him as Chairman. His remaining Chairman for such a long period was exceptional. For many years the Commissioners elected by a system of rotation a chairman to act for one year. Vol. 31 M. C. C. (p. II) states "Chairman Eastman, having been appointed Director of the Office of Defense Transportation, established by Executive Order 8989 of the President, dated December 18, 1941, did not participate in the disposition of matters reported in this volume after December 31, 1941, except in those instances where his participation is noted." Chairman Eastman, as indicated above, did participate in the instant case. Formerly, while still holding the office of Commissioner, Mr. Eastman was appointed and held the position of Federal Coordinator of Transportation under authority of section 2, Emergency Railroad Transportation Act, 1933, U. S. Code, Title 49, section 252, 48 Stat. 211.

203 (a) (14) of the act the rail carrier, in circumstances essentially identical with those indisputably shown below with respect to appellant's motor vehicle service, was a common carrier by motor vehicle and entitled to receive a grandfather certificate as such. The effect of appellant's being obliged under compulsion of the order of the Commission and the judgment of the District Court herein to discontinue this form of supplemental and auxiliary transportation service in addition to denying him rights granted in the grandfather provision of Motor Carrier Act, 1935, will be to deprive appellant of a substantial volume of traffic and earnings therefrom, and further, to prevent appellant from making the most efficient and effective use of existing railroad installations, facilities, and personnel. The volume of merchandise freight which appellant is now transporting by these motor vehicle operations is in excess of 150,000,000 pounds annually and is increasing (R. 37, 157). In 1936 this freight so transported was in excess of 98,000,000 pounds (Exhibit 4 of Exhibit 1-A, R. 44, 71, 141, 172).

Specification of Errors.

Appellant intends to urge the following errors assigned upon the record:

1. The District Court erred in failing to set aside the order of the Interstate Commerce Commission herein, because the order is (1) arbitrary and is in conflict with the legislative standards prescribed by the Congress; (2) violates the legislative intent expressed in Motor Carrier Act, 1935, as construed by this Court; (3) ignores the undisputed and uncontradicted evidence of record; (4) rests upon assumptions of fact not of record before the Commission; (5) violates the legal principle that the act must be applied and administered uniformly and without discrimination; (6) operates to discriminate against appellant and

the property administered by him; (7) is without support in the evidence; (8) is not supported by essential findings of fact; and (9) deprives appellant of rights and of property without due process of law.

2. The District Court erred in failing to find and to hold as a matter of law that application of the legislative standards prescribed by the Congress in Motor Carrier Act, 1935, as construed by this Court, to the undisputed and uncontradicted evidence of record required the Commission to grant appellant's application for grandfather rights.

3. The District Court erred in failing to find and hold that upon the undisputed and uncontradicted evidence of record before the Commission the application should have been granted under section 207 of the act.

4. The District Court erred in entering findings of fact, conclusions of law, and judgment sustaining the Commission's order and dismissing the complaint.

ARGUMENT.

I.

The Order of the Commission Is Violative of Fundamental Principles of Statutory Construction, Wholly Disregards the Legislative Standards Prescribed by the Congress, and Deprives Appellant of Rights Granted by Statute.

(a) Grandfather Clause of Motor Carrier Act, 1935, Is a Grant of Statutory Rights.

The attention of the Court is invited to the fact that appellant is not a mere disappointed applicant for operating authority in the nature of a privilege or a license. Appellant, on the contrary, is asserting and relying upon valuable rights granted by Congress in Motor Carrier Act, 1935, and as the result of the arbitrary denial of those rights by the Commission is obliged to come before this Court for relief.

There can be no doubt that the Congress has made a grant of rights to carriers such as appellant. This Court so held as recently as March 2, 1942, in *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, wherein the Court set aside an order of the Commission primarily on the ground that the Commission in granting a certificate of public convenience and necessity under the grandfather clause of the act had, without authority of law, unduly restricted the scope of the certificate. The Court said (p. 489):

> "*Congress has made a grant of rights to carriers such as appellee.* Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen." (Emphasis supplied.)

The Court so held also in *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 53.

(b) The Act Is Remedial in Character and Must Be Liberally Construed in Order to Preserve the Position of Carriers Such as Appellant in the National Transportation System.

The Transportation Act, 1920, was remedial legislation and repeatedly has been given a liberal interpretation in order to effectuate the Congressional intent and purpose. *Piedmont & Northern Ry.* v. *Comm'n*, 286 U. S. 299, 311. This Court holds that the same principle applies to Motor Carrier Act, 1935, and particularly the grandfather clause thereof. *McDonald* v. *Thompson*, 305 U. S. 263, 266. *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488.

In the application of this principle in *U. S.* v. *Carolina Carriers Corp., supra*, the Court (p. 488) said:

> "A restriction in this case of the commodities which may be carried from any one point on southbound trips is a patent denial to appellee of that 'substantial parity between future operations and prior bona fide operations' which the Act contemplates. [Citing *Alton R. Co.* v. *United States*, 315 U. S. 15.] Its prior opportunity should not be restricted beyond the clear requirements of the statute. *For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities, as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights.*" (Emphasis supplied.)

A denial of appellant's statutory rights unfortunately has been the result so far in the instant case. Appellant is not seeking to perform any transportation service which has not been performed by him or the Railway for a period of years, in some instances as early as 1931. But the order of the Commission and the judgment of the Court below operate to deny and extinguish these rights and to

compel appellant to discontinue a method of carriage which is economical, flexible, expeditious, and generally useful, not only to appellant but also to the public.

Appellant relies upon the grandfather provision of the act as construed and applied by this Court in the *Carolina Carriers Corp. Case*, and other cases in order to preserve the position which the Railway property administered by him has obtained in the national transportation system.

(c) Ultimate Ascertainment of the True Meaning and Intent of the Grandfather Clause Is Within the Province of This Court and the Commission's Views Are Not Controlling.

As stated in *U. S.* v. *Rosenblum Truck Lines*, 315 U. S. 50, 53, the question presented by this aspect of the case is, as in any problem of statutory construction, the intention of the Congress. That the construction of the grandfather clause and its application to undisputed facts are law questions the final decision of which rests with this Court is established by the case just cited and the following cases: *United States* v. *Maher*, 307 U. S. 148, 152. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 544. *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, 485-8. *Gregg Cartage Co.* v. *U. S.*, 316 U. S. 74, 80, 85-8. Views and decisions of the Commission are in no sense controlling and will be sustained only where they accord with the Court's determination of the Congressional intent.*

* Other representative authorities supporting the fundamental principle that the Commission's views on questions of law are not binding upon the courts are: *Great Northern Ry.* v. *Delmar Co.*, 283 U. S. 686. *Atchison etc. Ry. Co.* v. *United States*, 284 U. S. 248. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. *St. L. & O'Fallon R. Co.* v. *U. S.* 279 U. S. 461. *Alton R., Co.* v. *United States*, 287 U. S. 229, 239. *Interstate Commerce Com.* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14. *U. S.* v. *N. Y. Central R. R.* 263 U. S. 603. *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.* 270 U. S. 266. *United States* v. *Idaho*, 298 U. S. 105. *Powell* v. *United States*, 300 U. S. 276. *Arizona Grocery* v. *Atchison Railway*, 284 U. S. 370. *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104. *Brown Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393. *B. & O. R. R.* v. *United States*, 277 U. S. 291. *Interstate Comm. Comm.* v. *Nor. Pac. Ry.*, 216 U. S. 538. *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, 532.

(d) The Grandfather Provision of the Act as Construed and Applied by This Court Requires the Granting of a Certificate to Appellant as a Matter of Law. The Contrary Result Imposed by the Commission's Order Would Curtail the Effectiveness of the Motor Carrier Act.

The material provisions of section 206,* including the grandfather clause, Motor Carrier Act, 1935, are as follows:

> "*No common carrier by motor vehicle subject to the provisions of this part shall engage in any* interstate or foreign *operation on any public highway,* * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, * * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, * * *. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *"

Under the heading "Definitions" section 203 (a) (14) of the Act provided:

> "As used in this part— * * *
>
> The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport

* As to certain details not requiring notice herein, this section was amended by section 8, Act of June 29, 1938 (52 Stat. 1238) and section 20 (c), Act of September 18, 1940 (54 Stat. 923).

passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."*

It is apparent, therefore, that the statute by its own terms legislatively defines a common carrier by motor vehicle.

In view of the effect given these statutory provisions by this Court's decision in *U. S.* v. *Rosenblum Truck Lines*, 315 U. S. 50, decided January 19, 1942, appellant confidently asserts that upon the undisputed evidence, summarized above in our statement of this case, a certificate of public convenience and necessity should be granted appellant under the grandfather clause of the act. For the controlling facts in the two cases exhibit complete parity.

In the *Rosenblum Case* certain possessors of vehicular equipment were denied contract carrier permits under the grandfather clause of section 209 (a) of the act and the Commission's denial order was sustained by this Court. The asserted claim for grandfather rights arose out of the circumstance that applicants used their vehicles, driven by their employes, in transporting, under contract, freight for common carriers. Freight so handled was solicited by the common carriers, accumulated at their terminals, loaded and unloaded by their employes, and moved from

* This definition remained as set forth above until its amendment September 18, 1940. 54 Stat. 920; 49 U. S. C. § 303. Appellant's application to the Commission was filed February 11, 1936, the hearing was held March 28, 1938, the case submitted to the Division on April 19, 1939, and the order of the Commission (by Division 5) was issued November 26, 1941. (R. 17, 45, 15.) It is therefore unnecessary to consider the amendments for these provisions as originally enacted in 1935 are determinative of appellant's rights under these circumstances. *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, 482; *Fullerton Co.* v. *Northern Pacific*, 266 U. S. 435, 437; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, 637; *Shwab* v. *Doyle*, 258 U. S. 529, 534.

consignors to consignees on the common carriers' way bills.

The Commission denied the application on the theory that the equipment was operated solely under the direction and control of the common carriers and under the latters' responsibility to the public and to the shippers.

This Court noted that the evidence clearly showed that on the critical date and for a period thereafter applicants in that case helped the common carriers move freight, and that each job was an integral part of the single common carrier service offered to the public by the common carriers for whom they hauled.

The Court observed that the question there, as in any problem of statutory construction, is the intention of the enacting body, and further, that Congress has set forth broadly a declaration of policy which is the regulation of transportation by motor carriers in the public interest so as to achieve adequate, efficient and economical service. The Court noted also that to implement that policy Congress forebade common carriers by motor vehicle to operate in interstate commerce without securing a certificate of public convenience and necessity from the Commission, and required contract carriers to secure a permit from that body, and those carriers engaged in either of such operations on the respective critical dates and continuously thereafter were to be given the requisite certificate or permit *as of right* under the grandfather provisions.

The *Rosenblum* decision is distinctly to the effect that although applicants there were an integral part of the single common carrier service offered to the public by the common carriers for whom they hauled, it was the *common carriers who offered the complete transportation service to the general public and the shippers.* And it was on that theory that the Court held that applicants in that case were not entitled to a permit for that part of the service provided by them and their equipment and drivers.

So far as this particular traffic and the form of transportation here under consideration is concerned, it is manifest that under authority of the *Rosenblum case* the owners of the equipment—the contractors—could have no rights with respect to traffic conveyed in the vehicles for appellant, either as common carriers or as contract carriers, because they were not in fact or in law common carriers or even contract carriers. Appellant and the predecessor Railway offered and furnished the "single common carrier service" or "complete transportation service" to the general public and the shipper.

Denial of appellant's rights in the premises would place his form of coordinated, auxiliary and supplemental rail and motor transportation service within a twilight zone beyond the scope of the Commission's authority. Such a construction of the act manifestly would do violence to the plain intent of Congress to subject all common carriers by motor vehicle to the jurisdiction of the Commission. And to that extent the act would be ineffective and would fail to accomplish the purpose for which it was passed. Such construction would also violate the intent expressed in the definition of "common carrier by motor vehicle," above quoted, to include "motor vehicle operations of carriers by rail * * *". (p. 23 hereof.)

This Court has long held to the rule that there is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience. *Bird* v. *United States*, 187 U. S. 118, 124. *United States* v. *Powers*, 307 U. S. 214. Application of the rule requires that operations conducted by appellant during the grandfather period must be considered those of a common carrier by motor vehicle within the meaning of Motor Carrier Act, 1935, not only that appellant's *rights* under the act be preserved but also that the act be made applicable to all forms of common carriage and be completely effective.

The close analogy of the *Rosenblum* case in all essential facts, in our view, gives it controlling importance here. Add to it the further facts here present that appellant's motor carrier operations have accomplished a measurable degree of that coordination which constitutes one of the primary purposes of the Act and that appellant here seeks only that "substantial parity between future operations and prior *bona fide* operations" which it was the purpose of the grandfather clause to assure, and the conclusion that the order here in question was in violation of the statute seems to us unavoidable. (*Alton R. Co.* v. *United States*, 315 U. S. 15, 19; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 481.) We proceed, however, to discuss in some detail the errors inherent in the Commission's order and the infirmities of the majority report of Division 5.

(e) The Order in Effect Reads Out of the Statute the Expression "Any Other Arrangement" and the Reference to "Motor Vehicle Operations of Carriers by Rail".

The report of Division 5 which accompanied the order here complained of (Appendix I), shows that the only discussion of appellant's grandfather rights is found in the two paragraphs on page 301. Examination thereof discloses that the phrase "or any other arrangement" in the legislative definition of a "common carrier by motor vehicle" set forth in section 203 (a) (14) of the Act was not mentioned and was given no legal effect whatever.

It is important to bear in mind that the report was not agreed to by all members of the Division. Chairman Eastman, now Director of Office of Defense Transportation, in a separate opinion stated: "I am of the view that the 'grandfather' application should be granted rather than denied." He referred to and adopted the reasoning of his previous dissent in *Missouri Pac. R. Co. Common Carrier*

Application, 22 M. C. C. 321, wherein he held (pp. 333-6) that operations carried on by a railroad through making use of vehicular equipment and drivers obtained under contracts with a trucking concern substantially identical with those here involved (pp. 324-6) came within this legislative definition of a common carrier by motor vehicle.

Chairman Eastman, in support of that construction and application of the act, observed that there are practical aspects of the matter which should not be overlooked where a carrier by railroad undertakes to engage in transportation of another kind, partly as a substitute for and partly to supplement its rail service. With respect to this method of making use of equipment, facilities, and personnel of truckers under contract, the Chairman stated (pp. 334-5):

> "It seems to me that all essentials of an '*other arrangement*' such as is contemplated by the definitions of section 203(a)(14) and (15) were and have been present."
>
> • • • • •
>
> "Such an *arrangement* can be consistent with the principles of good management, *and I do not believe that it was the intent of the act to stand in the way of such arrangements.*" (Emphasis supplied.)*

It is manifest that the construction placed by the majority of the Division upon this legislative definition operates so as greatly to restrict, and in this instance completely to deny, effect to the words "or any other arrangement" which immediately follow the reference to a lease and to deny effect also to the reference to motor vehicle operations of carriers by rail.

Stating the proposition in a somewhat different way, the order applies the statutory provision in the same man-

* Since an early day dissenting opinions have received the consideration of this Court in dealing with reports and orders of the Commission. *Southern Pac. Co. v. Interstate Comm. Comm.*, 219 U. S. 433, 449-50; *Great Northern Ry. v. Sullivan*, 294 U. S. 458, 461. This practice is particularly appropriate where, as in this case, the questions presented relate to the proper construction and application of governing statutes. The dissent usually serves to expose such weaknesses as inhere in the majority opinion.

ner as though the expression "or any other arrangement" and the reference to "motor vehicle operations of carriers by rail" were not included in the section.

Such limitation upon and avoidance of the plain terms of a statute are completely inconsistent with the most elemental tenets of our constitutional law as stated repeatedly in decisions of this Court. As several of the cases cited elsewhere herein well illustrate the point, amplification seems unnecessary here.

It seems entirely clear that application of the most obvious and commonplace rules of statutory construction requires that usual and ordinary effect should be given to the words "or any other arrangement," as held by Chairman Eastman. This would bring appellant's method of operation directly within the terms of the statutory grant. It was and is an "arrangement" of a common carrier by rail to transport property for the general public in interstate commerce by motor vehicle for compensation in which it becomes also a common carrier by motor vehicle.

In this behalf we again invite attention to the fact that so far as this traffic is concerned the owner of the motor vehicle equipment has no contact with the shipper or receiver of this freight, and thus in no sense may be regarded as a common carrier by motor vehicle, or otherwise. The only common carrier involved was and is the appellant in every factual and legal sense, for it is appellant, and he alone, who "undertakes * * * to transport * * * property * * * for the general public." *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 482-3.

(f) The Order Operates to Read Into the Act Legislative Standards Not Prescribed by the Congress.

The legislative standard prescribed is that in order to obtain a certificate under the grandfather provision of the act the common carrier by motor vehicle must have been in

bona fide operation on June 1, 1935, over the route or routes or within the territory for which application is made and has continued to operate since that date. Incorporated in this standard and essentially a part of it is the definition of a common carrier by motor vehicle as including the motor vehicle operations of carriers by rail, "whether directly or by a lease *or and other arrangement.*" (Sec. 203 (a) (14), *supra.*)

The majority of Division 5 concluded that

> "Applicant (appellant) does not operate motor vehicles either as owner or under lease or any other *equivalent* arrangement."

Then, after noting and giving emphasis to certain portions of appellant's contracts with the truckers and ignoring other equally important provisions and the general scope of the "arrangements" provided for and so designated in the contracts, the majority stated its conclusions in the following form:

> "These, as well as other provisions in the contracts, establish that the motor vehicles are to be supplied by the contractors and operated *under their direction and control and under their responsibility to the general public as well as to the shippers.* It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant. See *Willet Co. of Indiana, Inc., Extension—Ill., Ind. and Ky.*, 21 M. C. C. 405. It follows that the application must be denied." (Emphasis supplied.) (Appendix I, p. 301.)

The effect is to read into the statute the additional standards (1) that the carrier undertaking to render a common carrier service through other than direct ownership and operation or by a lease of motor vehicles must do so by an arrangement "equivalent to a lease", and (2) that the *operation* of the motor vehicles, as distinguished from the *undertaking to transport* must be under such an ar-

rangement as will keep the motor vehicles at all times under the direction and control of the undertaking carrier and under that carrier's *responsibility to the general public as well as to the shippers.* Only by means of this introduction of new elements into the statutory standard and, as will be later discussed, by disregard of other undisputed and controlling facts as well as an assumption unproven by facts, was the majority enabled to reach its ultimate conclusion that the application must be denied.

The introduction of the modifying term "equivalent" and the violent conversion of the statutory test of an undertaking to transport by means of motor vehicles into the more rigorous requirement that such undertaking must involve actual direction and control of the vehicles themselves and a direct assumption of liability to the general public, alike had the effect of withholding and cutting down the statutory grant—a process condemned in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 481.

It is, of course, elemental that the Commission may not thus usurp the power of Congress. It has no more authority in the guise of construction or in any other manner to impose additional statutory standards and requirements than it has to evade or disregard those set forth in the statute. Such administrative enlargement of a plain and unambiguous statute is not permissible even to supply an inadvertent omission or otherwise to promote the purpose of the statute. *Iselin* v. *United States*, 270 U. S. 245, 250-1; *Wallace* v. *Cutten*, 298 U. S. 229, 236-7. Where, as here, the attempted modification of the statute would frustrate rather than promote the purposes and intent of Congress, the setting aside of the administrative order grounded thereon, must, it seems to us, necessarily follow.

(g) The Background and Legislative History of Motor Carrier Act, 1935, Establish That Appellant Comes Within the Class Intended by Congress to Be Granted Grandfather Rights.

Notwithstanding the plain language of the statute supporting appellant's claim of right under the grandfather clause, investigation of the legislative background and history for confirmation of the congressional intent is permissible. Sanction for such inquiry is found in recent opinions of this Court. *U. S.* v. *American Trucking Ass'ns*, 310 U. S. 534, 543-4; and *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479, 81 L. Ed. 320, wherein the unanimous opinion states:

> "But words are inexact tools at best and, for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination."'"

The background for Motor Carrier Act, 1935, is traced in the statement of the case (*ante*, pp. 5-8). It appears that by official reports the Congress was informed and advised by the Commission during the period 1928 to 1932 that railroads "should be authorized to engage in interstate commerce by motor vehicle on the public highway;" that railroads had undertaken to test the possibility of trucks for use in connection with rail service and "their use of trucks in substitution for train service in areas of light traffic has been uniformly beneficial in reducing cost and improving service;" that the preponderance of railroad truck operations was through the means of wholly owned subsidiaries, but there was a "substantial amount of truck operation under contracts with independent contractors;" that rail carriers "should be encouraged in the use of" transportation by motor vehicles over the public highways "wherever such use will promote

more efficient operation or improve the public service;" and that legislation should be enacted providing, *inter alia*, "that certificates should be issued as a matter of course to bona fide operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the act."

On December 1, 1932, in the Forty-Sixth Annual Report to the Congress (p. 2[illegible]) the Commission observed that there is a great opportunity for advantageous use of motor trucks to supplement or in substitution for railroad service, and that the Commission welcomed the numerous experiments being made in that direction.

Again, in the Fifty-Second Annual Report to the Congress on November 1, 1938 (p. 13), the Commission said that many railroads are using trucks in place of local way freight service with much advantage. This expression, although subsequent to the enactment of Motor Carrier Act, 1935, together with other official expressions of the Commission already noted, demonstrates that the Commission prior to the enactment of Motor Carrier Act, 1935, and thereafter had full knowledge of the kind of coordinated, supplemental and auxiliary motor-rail service here involved; reported its findings and recommendations to the Congress, and the Congress had before it these facts and expressions of opinion when it passed Motor Carrier Act, 1935. During the period just mentioned Mr. Eastman had at all times been a member of the Commission, most active in its investigations of this subject. In 1933 he became Federal Coordinator of Transportation.*

This background of the legislation fully conforms to the intent of the Congress, so obvious in the provisions above quoted, to make the definition of a "common carrier by motor vehicle" in section 203 (a) (14) of the act sufficiently broad to subject to regulation operations by rail

* See Emergency Transportation Act of 1933, 48 Stat. 211

carriers of the kind here presented, and to grant grandfather rights on basis thereof to the rail carriers furnishing complete and integral service by making use of motor vehicles to perform a part thereof.

In reporting to the Senate the bill which later became Motor Carrier Act, 1935, Senator Wheeler, on behalf of the Committee on Interstate Commerce, noted the unequal competitive conditions which induced the legislation, the genesis of the bill and its broad purpose to produce a coordinated national transportation system (R. 44-45).*

In the same report Senator Wheeler related that Commissioner Eastman as Coordinator had previously made elaborate surveys and studies of the need for this regulatory measure and that the bill then being reported was in large measure "comparable to Mr. Eastman's recommendations." This circumstance emphasizes the faultless logic of Mr. Eastman's dissents in this and the *Missouri Pacific* cases and lends an especially high degree of author-

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* "In recent years there has been an extraordinary growth of highway transportation. Thousands of miles of hard-surface highways have been developed and are teeming with millions of automotive vehicles. Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers or the carriers themselves. The competitive struggle is to a large extent unequal and unfair, inasmuch as the railroads are comprehensively regulated, the water carriers are regulated in lesser degree, and the interstate motor carriers are scarcely regulated at all.

* * * * * * *

"This bill is a part of a complete and coordinated program of legislation touching all forms of transportation recommended by the Federal Coordinator of Transportation. The ultimate objective of the entire program is a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art. All parts of such a system of transportation should be in the hands of reliable and responsible operators whose charges for service will be known, dependable, and reasonable and free from unjust discrimination. This bill proposes to bring about such conditions among the interstate motor carriers, the only ones now almost wholly unregulated by Federal authority." (Cong. Rec., Vol. 79, p. 7878.)

ity to his conclusions that the grandfather applications should be granted in both cases.

Senator Wheeler's explanation of the bill on the floor of the Senate confirmed the purpose and intent to include motor vehicle operations undertaken by rail carriers, such as we have in the instant case. He also again acknowledged Coordinator Eastman's joint effort in the final draft of the bill (R. 44-5).*

Representative Sadowsky of the Interstate Commerce Committee in the House of Representatives reporting the bill for that Committee stated the intent of the grandfather clause to confer authority upon "carriers in operation * * * as a matter of course * * *."**

* "Paragraphs (14) and (15), page 6: The term 'common carrier by motor vehicle' includes both regular and irregular route operators and embraces the motor-vehicle operations of rail, water, express, and forwarding companies, except to the extent that these operations are subject to the provisions of part I. To the definitions of both common and contract carriers the committee added language intended to check evasion of the act by bringing within its terms such transportation operations as are performed through the leasing of motor vehicles or other similar arrangements which may constitute either common or contract carriage, according to the particular nature of the arrangements. The language inserted will enable the Commission to strike through such evasions where the facts warrant it."

The bill was drafted originally by Coordinator Eastman and approved by the Interstate Commerce Commission, which transmitted it to Congress. When it came to the committee and after the hearings, the committee took up the bill and spent every morning on it for perhaps a week and went over it in conjunction with Coordinator Eastman, and amended it and liberalized it as we felt it should be.". (Cong. Rec., Vol. 79, p. 5878.).

** "The grandfather clause as of June 1, 1935, has been fixed in fairness to bona fide motor carriers now operating on the highway and limited so as to prevent speculation which is highly important. Motor carriers starting operations since that date are required to file applications for hearing and present proof.

Carriers in operation before that date will receive certificates or permits as a matter of course, as soon as they have complied with the regulatory features of the bill." (H. of R. Rep. No. 1645, 74th Cong., July 24, 1935.)

(h) The Ordinary Broad Meaning of the Term "Arrangement" as Applied by the Courts and the Commission Confirms Appellant's Claim for Grandfather Rights Here.

A rather thorough search has developed that there are surprisingly few definitions of the term "arrangement" in decided cases. It has also developed the certainty that there is neither reason nor precedent supporting the narrow and restricted application accorded the word by the Commission in the proceeding hereunder.

The Commission at an early date gave the word arrangement a broad and comprehensive definition and meaning. *Boston Fruit & Produce Exc.* v. *New York & N. E. R. R. Co.*, 4 I. C. C. 664, 5 I. C. C. 1. The Commission in that case held that if railroads provided a through route for the handling of interstate traffic over their lines so that the continuity of the shipment is preserved and preparatory measures and disposition of affairs provided for the reception, carriage, and delivery of the traffic, an arrangement exists. The Commission there was dealing with carriage under a single control, management, or "arrangement" for continuous carriage or shipment, as expressed in section 1 of the original Act to Regulate Commerce (Act of Feb. 4, 1887, 24 Stat. 379), the predecessor of section 1 (1) (a), Part I, Interstate Commerce Act, U. S. Code, Title 49, sec. 1. To the same effect also is *Standard Oil Co. of New York* v. *United States*, 179 Fed. 614, 620.

Dictionary definitions of arrangement are likewise broad and inclusive. Perhaps as good a definition of the term as is to be found is that expressed in *People* v. *American Ice Co.*, 120 N. Y. Supp. 443, wherein the Court in charging the jury in a trial under the so-called Anti-Monopoly Act said (p. 449):

> "It is evident that the Legislature by the use of this word [arrangement] meant something different from a 'contract' or 'agreement' or a 'combination.' In

> our judgment it has a broader meaning than either the word 'contract,' 'agreement,' or 'combination.' It may include each and all of these things, and more. The usual and ordinary meaning of the word 'arrangement' is 'a setting in order''; but the better and fuller meaning of the word as used in the statute is that given in the 'New English Dictionary,' edited by James A. H. Murray. It is there defined as: 'The disposition of measures for the accomplishment of a purpose; preparation for successful performance.' It is further defined in the same dictionary as: 'A structure or combination of things in a particular way for any purpose.''

The Commission comparatively recently has noted the broad application commonly accorded the term "arrangement" in *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, where, as subsequently noted here in more detail, an earlier report and order of Division 5 was reversed. The Commission noted (p. 562) that there are "a great variety of *arrangements* under which carriers employ agents in their operations."

On the same page, in speaking of the application there of a carrier by motor vehicle to obtain contract carrier authority to perform pick-up and delivery service for certain common carriers by rail, the Commission said:

> "* * * applicant would not, under the proposed *arrangement*, operate in its own right, but would only act for and in the right of the two railroad companies which could at any time perform the service with their own vehicles and their own employes." (Emphasis supplied.)

These expressions from opinions on behalf of the entire Commission serve to emphasize the irreconcilable conflict with the opinion concurred in by the two members of Division 5 in denying appellant's rights under grandfather clause—a subject to be discussed in a later section of this brief.

The form of written agreement used by appellant (Exhibit 3 to complaint and Exhibit 6 of Exhibit 1-A; R. 25-29, 145) specifically uses this term three times, (1) in the preamble, which recites that the "Railway Company desires to *arrange* for the handling of certain freight" between the Railway's freight stations therein named, (2) where the right is reserved for the Railway "to *arrange* with others" than the contractor (R. 145), and (3) in paragraph 8, where, in the event the highways between the various stations become impassible, the contractor is required immediately to notify the Railway Company so that it may have as much time as possible within which to *arrange* and substitute other service if it so desires between stations named in the contract; and thereafter *to make arrangements* for discontinuance of the substitute service when the contractor resumes operations.

Appellant does not contend that the Congress enacted Motor Carrier Act, 1935, with actual knowledge of the particular form of written agreement between the Railway and the contractor. But it is by no mere coincidence that the legislative definition in section 203 (a) (14) makes use of the noun "arrangement" as did appellant's form of contract use the verb "arrange." The Congress knew from official reports of the Commission that railroads were resorting to motor carrier service in an experimental way, and that commonly they avoided large investments in equipment by entering into contracts with those referred to as "independent truckers" (182 I. C. C. 263, 375-376). The Congress, therefore, as might well be expected, adopted this very broad legislative definition of "common carrier by motor vehicle," including by specific reference motor vehicle operations of carriers by rail, advisedly, so as to embrace within the terms of the act and the grandfather clause thereof the practice here under consideration and all other practices through which rail carriers were transporting, or causing to be transported, their freight in

motor vehicle highway operations. "Whether directly or by a lease or any other arrangement" obviously was intentionally used in order to encompass the widest possible range of practices.

(i) The Commission's Conclusion Also Involves a Misinterpretation of the Contracts, a Disregard of the Evidence and Assumed Facts Not of Record.

Reference to the Commission's report (p. 301) shows that the majority of Division 5 rested their denial of appellant's grandfather rights also upon an erroneous interpretation of the contracts. No reference was made to the evidence other than the contracts and no mention was made of the legislative definition of "common carrier by motor vehicle" contained in section 203 (a) 14).

In discussing this aspect of the case we invite the Court's attention to the well-supported proposition that the views of the Commission as to the meaning, application and effect of these contracts are not controlling. It is basic that the determination of questions relating to the construction and application of contracts and other written instruments is not within the realm of the Commission's authority but is distinctly a judicial function. This Court repeatedly has so held with respect to railroad tariff schedules, a special and technical class of documents in writing over which the Commission holds regulatory powers, *inter alia*, the power to make rules for the simplication and form thereof. 49 U. S. C. § 6 (3), (6). *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285. *Great Northern Ry.* v. *Delmar*, 283 U. S. 686. *Brown Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393*

* In the *Merchants Elevator case* this Court observed (p. 290):

"Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law."

And the Court said further (p. 291):

"But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from

The summarization of the provisions of the contracts in the majority report (App. I, p. 301) is so incomplete as to be definitely misleading. The Commission, moreover, ignores and makes no mention of the undisputed evidence of record establishing that by all usual and accepted standards, including those prescribed by Motor Carrier Act, 1935, appellant and predecessor Railway, and not the contractor, were the "common carrier by motor vehicle" during the grandfather period and thereafter.

The majority also, in an effort to support its conclusion, as will be later discussed, reached outside the record, particularly where the Commission said that *on the whole* the contractors were established truckers who perform service for others than appellant and have filed applications claiming grandfather rights thereto. The use of the words "on the whole" demonstrates that some of the contractors at least were *not* established truckers and had *not* filed applications claiming grandfather rights. This aspect of the case will be deferred for further consideration herein (*post*, p. 65).

It is true that, under the contracts, the freight, while being moved between the Railway's freight stations over the highways was being transported in vehicles which the Railway did not own and, in a technical sense, could not be considered under lease and which were driven by immediate employes of the contractor and that the contractors were obligated to protect the Railway by insurance and otherwise for damage to the freight and to others resulting from the truck operation. But these circumstances are

those presented when the construction of any other document is in dispute." (Emphasis supplied.)

This principle was reiterated in the *Brown Lumber Company case*, wherein this Court in setting aside a reparation order of the Commission said (p. 398):

"The simple question for decision, as to each shipment, is whether there existed 'published through rates' in effect from point of origin to destination.' The determination of that question requires ordinarily merely the examination of the tariffs. The enquiry would, in all respects, be like that commonly made by courts when called upon to construe and apply any other document."

of no controlling legal significance since there was clearly an "arrangement" coming within the statutory definition. Yet the Commission gave exclusive and controlling effect to those facts and disregarded all of the remaining contract provisions and undisputed facts.

The Commission completely disregarded and gave no effect to these undisputed facts, among others: That the freight while thus being transported was in the care and custody of the Railway as a common carrier by rail and was being moved between its rail stations under its complete carrier responsibility to the shipper and charges were assessed according to its tariff schedules naming railroad rates; that transportation of the freight was solicited by the Railway from shippers for movement, and was actually moved, in accordance with rates and provisions, including the Railway's option to arrange for movement part way by motor vehicle, as set forth in its aforesaid tariffs; that the Railway was and remained responsible at all times to the shipper or receiver of the freight for safe handling and delivery at ultimate destination; that the freight moved exclusively on railroad billing and the truck contractors had no contact with the shippers or receivers of the freight, executed no bills of lading or other shipping papers, had no contractual arrangements whatever with shippers or receivers; and that it was only to the Railway that the shipper or receiver could look for performance of any part of the common carrier transportation service involved and for the handling and settlement of claims in respect of the transportation.

The majority ignored and gave no effect to the additional uncontradicated and undisputed facts that this method of handling of merchandise freight was developed by the Railway after mature study and investigation commenced as far back as 1925 for the purpose of furnishing an improved and more convenient common carrier service to the public, of making it possible to curtail car mileage

and way-freight service and to bring about more flexibility in the merchandise freight service of the Railway as a whole. This plan amounted only to the introduction of a new method of carrying on in part the Railway's merchandise freight transportation business in which it had been engaged for many years, exclusively as a common carrier.

This new operation did not extend the Railway's territory in any way but was confined to the highway movement of merchandise freight between its freight stations in very limited territories where such a plan of operation would improve the service, bring about economies and otherwise be desirable not only to the Railway but to the public. In other words, this merchandise freight was transported in all respects by the Railway as a common carrier in exactly the same manner as it had always done in the past, except that the freight instead of moving all the way in a box car was transported in a motor vehicle over the highways between certain stations. The Railway, as permitted by the optional tariff provision approved by the Commission, *arranged* for this by means of contracts with *independent truckers*. This was a substituted or alternative method providing transportation service as a common carrier for the public and the Railway's responsibility as a common carrier with respect to all the freight so moved never ceased at any time.

The Railway made the schedules upon which the motor vehicles were operated, designated the freight to be handled and the stations between which it was handled, required the contractors to perform these services for it in a manner satisfactory to the Railway and held them responsible *to the Railway* for any damage occurring to the freight while in their custody. The contractors were further required to indemnify *the Railway* against claims and demands which might arise out of their performance of the contracts. All billing and accounting, including settlement on interline accounts with other railroads, was handled by the Railway

in the same manner as other freight transported all the way over the rails in a box car.

The conclusion on page 301 of the majority report (Appendix I) that the motor vehicles were operated under the direction and control of the contractors and under their responsibility to the general public as well as the shippers obviously misconstrues the contracts as a whole and evades the true purport and effect thereof. It ignores the recitals and terms which specifically characterize the transaction as an arrangement under which the *Railway* was employing the *services* of the contractor, his equipment and employe to move *the Railway's freight* between its railway stations when, as, and in such volume as the Railway might direct and to its satisfaction. The majority's summary (App. I, p. 301) of the contract provisions plainly shows that it gave heed only to the provisions whereunder the contractor was made responsible *to the Railway* and disregarded completely the primary and overriding responsibilities of the Railway.

The evidence, and it is entirely undisputed, has already been briefly summarized. It is apparent that the contractors bore no responsibility whatever to the shippers. The contractors were unknown to the shippers or receivers of freight and had no contractual arrangements with them. They could not and did not stand in the relation of a common carrier with the shippers and receivers.

The Commission cites no authority for the assertion that the vehicles supplied by the contractors were operated under their responsibility to the general public and this concept of the law was abandoned by the Commission in later decisions.* It is by no means certain that the Railway

* Chairman Eastman in his dissenting expression in *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, pointed this out and observed that the provision in the contract that the contractor should "protect, save harmless and indemnify" the railroad in connection with such liability is evidence that the railroad was not certain that it would be able effectually to deny or avoid responsibility. This view was adopted by Division 5 on reconsideration in *Crooks Term. Warehouse, Inc., Com. Car. Application*, 34 M. C. C. 679, decided August 24, 1942, wherein oper-

under this plan of operation would not have been liable to the public in case of injury or damage. The correct rule of law appears to be as stated in *Sun Insurance Office* v. *Re-Mac Transport Co.*, 132 Fed. (2d) 535, 537, as follows:

> "Where a common carrier by rail undertakes for itself to perform an entire service of transportation from point of origin to destination, it has long been settled that all those employed by it to carry out the transportation are to be deemed its agents." (Citing authorities.)

However, that form of responsibility is not a standard prescribed in Motor Carrier Act, 1935, and the Commission is without power to create such a standard.

The fact that the contract makes the contractors responsible *to the Railway* for claims arising out of loss, damage or delay to the freight entrusted to the contractor and for claims on account of loss or damage to property not being transported and injury to or death of persons arising out of the performance of the agreement by the contractor (paragraphs 4, 5, 6 and 7 of contract, Exhibit 3 attached to complaint (R. 27-28)), lends no support to the Commission's denial order. Manifestly, these are matters entirely between the contractor and the Railway and relate directly to the consideration for the contract and to the contractor's compensation. See *Crooks Term. Warehouse, Inc., Contr. Car. Application*, 34 M. C. C. 679, 685. Mimeographed report of August 27, 1943, in further hearing in the *Boston & Maine case*. (App. H hereof.) The public, and particularly the shipping public, is not interested in or concerned with these arrangements between the Railway and the contractor.

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ating authority was granted to a wholly owned motor carrier subsidiary of the Chicago, Rock Island & Pacific Railway; and again in *Boston & Maine Transportation Company Common Carrier Application*, decided August 27, 1943, Docket No. MC 75872 (mimeographed), wherein Division 5 of the Commission on further hearing granted authority to a wholly owned motor carrier subsidiary of the Boston & Maine Railroad; in both instances under the grandfather clause of Section 206 of the act. As the report on further hearing in the *Boston & Maine case* is not to be printed in full, it is reproduced as Appendix No. H of this brief.

The assertion by the Commission in the report (p. 301) that the motor vehicles are operated under the direction and control of the contractors is directly contrary to the essential facts of record and to the terms of the contract. Par. 1 (a) of the contract (R. 25-26) provides in terms that the contractor agrees to provide the equipment of such type as shall be satisfactory to the Railway for the purpose of transporting certain of the Railway's freight between stations therein named, in accordance with such schedules and instructions as shall be given by the Railway, and further, that the contractor shall transport such freight as the Railway may designate with the equipment as described in a manner satisfactory to the Railway.

Paragraph 2 of the contract provides that the entire compensation accruing to the contractor is a stated amount per hundred pounds of freight so transported and the weight specified in way-bills of the Railway are to furnish the basis for payment. (R. 26.) The same paragraph further provides that the contractor shall give receipts to the Railway for all freight delivered to the contractor, and upon redelivery at its freight stations the Railway shall furnish the contractor with receipts therefor.

It can be clearly seen that responsibility for the setting up and functioning of the entire arrangement for this substitute motor vehicle service rested with the Railway. For that reason it retained control and direction of the motor vehicle operations at all times and made the contractors responsible to it. They used their men and equipment to move for the Railway freight in its possession as a common carrier, when, where and as it directed. When they carried out the Railway's instructions their obligations were completely discharged.

The entire lack of responsibility on the part of the contractor to the shipping public is further confirmed by paragraph 8 of the contract (R. 29), providing that in event the highways between the various stations become impassable

the contractor shall immediately notify the Railway so that it may have as much time as possible within which to arrange and substitute other service if it so desires between these stations. This shows a complete absence of motor carrier responsibility by these contractors. In the same paragraph the contractor agrees also to resume operation of the motor vehicles as soon as the highways become passable and to notify the Railway in advance of the time that service will be resumed so that the Railway can make arrangements for the discontinuance of other service with the least inconvenience and expense. The provisions further reflect the contractors' status as mere agencies or subcontractors for the Railway.

As before indicated, the evidence does not support the assertion on page 301 of the majority report with respect to the contractors performing service for others than appellant and having filed applications claiming grandfather rights. But even if it had been true, as assumed by the Commission without evidence, that each of the truck operators was in his own right a common carrier of freight *other than that handled for the Railway*, we submit that this circumstance as a matter of law would not have changed the relationship either of the trucker or the Railway to the freight being handled under the contract. As to such freight, by force of the undisputed facts above set forth, the Railway had become and remained the common carrier because of its holding out and "undertaking" with the public and its bill of lading contracts with the shippers to which the truck operators were not parties and in which they were not mentioned and their identity or existence remained undisclosed. The Railway remained bound and responsible at all times to the shippers for the safe transportation of the freight over the entire distance from origin to destination by whatever means and without regard to what agencies or instrumentalities it might employ.

In contemplation of law the position of the Railway was

(c) **Denial of Grandfather Rights to Appellant Cannot Be Reconciled With Subsequent Orders of the Entire Commission Granting Grandfather Rights to Other Railroads Arising From a Similar Form of Auxiliary and Supplemental Rail and Motor Service Arranged for Under Substantially Identical Contracts.**

view, between an independent motor carrier and a railroad, although in the *Boston & Maine Case* the contract was between a motor carrier and a wholly owned subsidiary motor carrier of the railroad.*

There is a differentiating circumstance, however, between the *Boston & Maine Case* and the *Crooks Terminal Case*, on the one hand, and the instant case, on the other, but that circumstance in itself adds additional support to appellant's claim of grandfather rights. In both the *Boston & Maine Case* and the *Crooks Terminal Case* there was a record a direct conflict between the contractors furnishing the equipment, drivers, and certain services, on the one hand, and the carriers by rail, on the other hand, since the contractors were before the Commission as motor carriers in the same proceedings seeking a certificate in their own right.

As already pointed out, that situation does not exist in the instant case. There was and is no conflict between appellant, on the one hand, and the contractors, on the other, as to these particular rights. None of the contractors appeared in the proceeding, with the exception of one interested in three routes, and the purpose of his appearance, as stated by counsel, was merely for developing the facts. (R. 134-135.) As to the others it does not appear to what extent, if it all, they were motor carriers.

It is manifest that both Division 5 and the entire Commission have changed their point of view with respect to the legal effect of the form of contract with truckers used

* The fact that the Boston & Maine Transportation Company received the certificate is of no legal significance. It was a wholly owned subsidiary acting for the railroad and it made the contracts with the "independent contractor" truckers who actually operated the motor vehicles. It stood in the same relative position that the plaintiff occupies here. The railroad (Boston & Maine) had made no direct arrangements for the rendering of motor vehicle service but had the arrangements made in its behalf by this subsidiary company. The Commission held, rightfully, in such circumstances that the Transportation Company, not the railroad, should receive the certificate. There was no contest between them. The railroad received full recognition of its rights by having the certificate awarded to its subsidiary. The truckers received no certificate.

by appellant herein. As disclosed by the reports in *Missouri Pac. R. Co.* v. *Common Carrier Application*, 22 M. C. C. 321, the *Crooks Terminal* and *Boston & Maine* cases, and in the instant case, these four railroads used contracts substantially identical in form in instituting and making arrangements with truckers for supplemental and auxiliary motor vehicle service.*

Chairman Eastman's vigorous dissent in the *Missouri Pacific Case* expressed his opinion that the other two members of Division 5 had given the statute entirely too narrow a construction. He pointed out that under the form of contract there considered the railroad retained the right to direct and control the vehicles at all times, required adequate forces and equipment to be furnished for the prompt handling and movement of the freight according to its schedules and requirements and to its satisfaction. He further said (p. 334):

> "So far as the duties and obligations to the shipper are concerned, it is clear that applicant assumed full responsibility therefor. The question boils down, therefore, to one of whether applicant was fully responsible under all applicable provisions of law governing duties and obligations 'to the public generally.' The insistence that Transport† have the status of an 'independent contractor' and the agreement that it would not 'display the name or any advertisement' of applicant upon or about any of its vehicles are indications that applicant sought to be in a position to deny or escape legal liability for injury to or death of persons or damage to property, other than cargo, caused by Transport in its operations. However, the provision that Transport should 'protect, save harmless and indemnify' applicant in connection with any such liability is evidence that applicant was not certain that it would be able effectually to deny or avoid re-

* Incidentally, they all (R. 26) contain the clause relied upon by Division 5 in denying appellant's rights, characterizing the contractor as an "independent contractor."

† "Transport" was the contractor.

sponsibility. Furthermore, Transport was required to 'procure and keep in full force and effect' for applicant's protection 'public liability and property damage insurance', as well as cargo insurance, in amounts well above our requirements under section 215, and applicant was to be 'named as co-insured in each such policy of insurance.'

It seems to me that all the essentials of an 'other arrangement', such as is contemplated by the definitions of section 203 (a) (14) and (15) were and have been present, and for the future I have no doubt of our authority to make all of the provisions of the act fully effective with respect to the operations in question."

It is worthy of notice that the entire Commission in the second decision in the *Boston & Maine Case*, 34 M. C. C. 599, adopted the views and even some of the phrases of Chairman Eastman expressed in his opinion dissenting from the denial of a grandfather certificate to the Missouri Pacific.

The conclusion and views of Chairman Eastman are particularly important, since it was he who drafted the bill which later became the Motor Carrier Act and collaborated with the members of the Committees of Congress during the time when the act was being placed in final form. He may fairly be said to be the father of the Motor Carrier Act and he is possessed of a full knowledge and informed opinions as to its intent, meaning, and application.

An additional circumstance requiring that great weight be accorded Commissioner Eastman's informed and experienced judgment is that the President of the United States has twice selected him because of his outstanding qualifications to serve the Country in times of grave emergency in posts of great power and responsibility, first as Federal Coordinator of Transportation during the greatest depression of modern times, and second, as Director of the Office of Defense Transportation during the present war. Further-

more, his conclusions display a consistency over a long period, which is not to be found in the expressions of Division 5 as a whole.

In this connection it is interesting to note that this Court in *U. S.* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, at page 538 observed that Motor Carrier Act, 1935, was passed after detailed consideration and "It followed generally the suggestion of form made by the Federal Coordinator of Transportation."

It appears that the two Commissioners, who were the majority of Division 5, remained unconvinced when the *Boston & Maine Case** was decided August 10, 1942, since they are shown as dissenting. Subsequently, however, these two Commissioners apparently adopted or accepted Mr. Eastman's views expressed when he was Chairman of the Commission, since they, with Commissioner Patterson, as Division 5, granted the grandfather certificate to the Chicago, Rock Island & Pacific in the *Crooks Terminal Warehouse Case*, decided August 24, 1942.

Examination of the *Crooks Terminal Warehouse Case* shows that it not only is a complete reversal of Division 5's report and order in its previous decision in the same case (27 M. C. C. 39) but also is a direct repudiation of the views expressed by the majority of Division 5 in the report denying appellant's application (31 M. C. C. 299). In the last decision in the *Crooks Terminal Warehouse Case* (34 M. C. C. 679) the Commission (Division 5) found that under the contract the contractor was an independent contractor, was forbidden to display the name of the railroad, obtained common carrier operating authority from certain state commissions, and that the operations were conducted by vehicles owned by the contractor and driven by its employes, but that these circumstances were not controlling.

*Although Commissioner Eastman's views prevailed, he did not participate in the disposition of this case on reargument (34 M. C. C. 599), as he was then acting as Director of the Office of Defense Transportation. As indicated herein, he ceased to be Chairman of the Commission on July 1, 1942.

The same report (p. 685) brought out that the railway advertises and holds out the service to the public, solicits the traffic, engages in the contract of carriage, publishes the rates, assumes responsibility to the shipper for the goods transported, and operates vehicles under a contractual arrangement which to all practical purposes vests complete control and domination in the railway.

The Commission, moreover (p. 685), noted the fact that the contract required the trucker to furnish public liability and property damage insurance for the carrier's protection, and from that circumstance concluded that the railway is apprehensive that in full, or at least in some measure, it may be found liable to the general public for personal injuries or property damage resulting from the operation of the vehicle.

With respect to the fact that the contractor bore the expense of the insurance policies, the Commission said that doubtless the cost of such insurance was considered just as any other expense in connection with the operation when the parties entered into their agreement and decided upon the rate of compensation to be paid the contractor.

Here, again, is evidence that Division 5 finally has been converted to the views expressed by Chairman Eastman in his separate opinion in the *Missouri Pacific case*.

It apparently follows, from the unanimous decision of Division 5 in the *Crooks Terminal Warehouse case*,* upon reconsideration, that the cumulative power and effect of Chairman Eastman's logic and knowledge of the background and proper construction and application of the act have finally overcome their doubts as to the necessity of granting grandfather rights to authorize the continuance of previously existing motor carrier operations through arrangements with independent truckers such as were instituted by appellant's Railway prior to enactment of the statute.

* Rehearing was denied by the entire Commission by order entered under date of February 1, 1943.

This is confirmed by the mimeographed report of the Commission (Appendix H) on further hearing in Docket 7872, *Boston & Maine Transportation Company Common Carrier Application*, *supra* where a certificate of convenience and necessity was granted the Boston & Maine Transportation Company, a wholly owned subsidiary of the Boston & Maine Railroad under the grandfather clause of section 206 of the act.

The contract there involved in all essential respects was identical with the form of contract here under consideration. In the *Boston & Maine case*, however, it appeared that the motor vehicle contractor performed services not performed by contractors in this case. There the motor vehicle contractor collected freight charges accruing on the shipments and remitted the total amount of such charges to the Transportation Company or to an agent of the Boston & Maine, and occasionally the contractor paid claims and extended credit to shippers for the payment of freight charges and diverted shipments upon instructions from shippers. The record in the instant case shows beyond question that no such services were performed by the contractors who furnished the vehicular equipment. The transportation was exclusively between freight stations of the Railway and all shipments were transported and carried in the accounts in the same manner as though moved over the entire route in a box car. The contractors had no contact whatever with the shippers.

For some reason, however, which is not apparent, the Commission denied appellant's petition for rehearing.

In presenting this argument with respect to this aspect of the case, appellant has not overlooked the line of decisions holding that the fact that findings in a given case are inconsistent with conclusions reached by the Commission in other similar cases affords no ground for setting aside an order of the Commission. *See Western Chem. Co. v. United States*, 271 U. S. 268. *Virginian Ry. v. United*

States, 272 U. S. 658. *Assigned Car Cases*, 274 U. S. 564. *Georgia Comm.* v. *United States*, 283 U. S. 765.

These cases, however, deal with disputed questions of fact relating to the reasonableness of rates or practices which are matters for determination of the Commission. They have no application whatever to the instant case, wherein the essential facts are undisputed and there are involved the proper construction and application of statutory provisions and of written instruments, which are matters for the determination of the Courts. Moreover, appellant here is asserting specific rights defined and granted by statute.

(k) The Commission's Administration of the Grandfather Clause of Motor Carrier Act, 1935, Is Lacking in Uniformity and Has Discriminated Against Appellant and Arbitrarily Deprived Him of Valuable Rights.

By way of further amplification of the point last preceding, appellant asserts that a review of the commission's decisions develops that of all carriers by rail claiming grandfather rights under a coordinated, supplemental and auxiliary motor carrier service appellant is the only one who has been denied a certificate of convenience and necessity under circumstances similar to those here presented. The direct result is to work a serious and damaging discrimination against appellant and the property administered by him.

It is only in the instant case that the Commission has permitted the former views of the majority of Division 5 to prevail. In other cases the Commission has repudiated the expressions of that Division, as already explained, and finally the same Division in *Crooks Term. Warehouse, Inc., Contr. Car. Application*, 34 M. C. C. 679, reversed itself and has come around to the same point of view.

The order from which appellant is seeking relief stands along among precedents deserted even by the very two members of the Division responsible for its adoption. Unless this Court orders it set aside, it will nevertheless bring about the destruction of this improved, economical, and useful form of service and liquidation of appellant's rights under the statute, with consequent heavy loss to the trust estate he administers.

The majority of Division 5 were wrong from the first in respect of the relation of motor carriers by rail to service which they furnish the public by using under contract the equipment and certain facilities of independent motor truckers.

In *Scott Bros., Inc., Collection and Delivery Service*, 2 M. C. C. 155, decided June 10, 1937, the majority of Division 5 granted a motor carrier a contract carrier permit authorizing it to transport commodities generally in collection and delivery service for certain railroads. Commissioner Eastman dissented. After quoting the definition of "common carrier by motor vehicle" and "contract carrier by motor vehicle" included in section 203 (a) (14) and (15) of Motor Carrier Act, 1935, he said (pp. 169-170):

> "Certainly this collection and delivery service is a common-carrier service, at least in its relation to the shipping public. However, so far as the public is concerned, the undertaking to transport is by the railroad and not by the motor-vehicle operator. The latter merely acts as the agent of the railroad in the furnishing of the service. The railroad could perform it directly with its own vehicles, but prefers for convenience to hire it out. In either event, the railroad is the responsible party and the operations are part and parcel of its transportation service. Hence they fall within the category of 'motor vehicle operations of carriers by rail' in the definition of paragraph (14)."

On reargument in *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, the entire Commission reversed Division 5, holding that the applicant there was not a contract carrier by motor vehicle, since it was used by railroads only as an instrument or agency for completing a railroad transportation service under railroad tariffs and rates. The service of the motor carrier, according to the Commission's view (pp. 564-565) "is clearly an integral part of a railroad common-carrier service under section 1 (3) of Part I" of the Interstate Commerce Act.

The two members of the Commission who made up the majority of Division 5 in the original report vigorously dissented. Commissioner Eastman found it advisable to append a separate concurring opinion, expressing regret that the two dissenting members did not agree with the views of the entire Commission. The decision of the entire Commission in the *Scott Brothers case* bears date of February 28, 1938.

The next report of the Commission of importance here is *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, decided March 23, 1940. That case, as already indicated, was decided by the two Commissioners making up the majority of Division 5, with Commissioner Eastman, then chairman, dissenting. That decision apparently did not interfere with operations of the Missouri Pacific greatly because, contrary to the decision of the Commission in the instant case, the application of the Missouri Pacific was granted under section 207 of the act.

The next in succession was *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, decided October 10, 1941, wherein the same two Commissioners constituting a majority of Division 5 denied an application of the Boston & Maine Railroad and Boston & Maine Transportation Company, a wholly owned subsidiary of

the Railroad. Chairman Eastman dissented and in substance expressed the same views set forth in his dissent in the *Missouri Pacific case*.

The case next following was the report of Division 5 in the instant case (31 M. C. C. 299), with Chairman Eastman in substance dissenting, as in the *Missouri Pacific case*, and stating that the grandfather application should have been granted.

As already explained, the order of Division 5 in the *Boston & Maine case* was reversed by the entire Commission. 34 M. C. C. at page 599. In that decision of August 10, 1942, the same two members of Division 5 dissented. But two weeks later in the report of reconsideration in the *Crooks Term. Warehouse, Inc., Contr. Car. Application*, 34 M. C. C. 679, Division 5, including the two Commissioners who had provided the majority against appellant's application, became converted to the views of Chairman Eastman so clearly expressed and consistently maintained by him throughout the entire series of decisions.

The conversion of Division 5 to the views so often expressed by Chairman Eastman now appears complete. As already indicated, in the mimeographed report (Appendix II) issued by Division 5 (Commissioners Lee, Rogers and Patterson) under date of August 27, 1943, in MC 75872, *Boston & Maine Transportation Company Common Carrier Application*, on further hearing the Division granted a certificate of convenience and necessity to the Boston & Maine Transportation Company authorizing operation over certain routes denied in the original report in the same case (30 M. C. C. 697).

Thus has the Commission permitted the denial order herein to stand, notwithstanding the fact that the underlying fallacy of the order subsequently was recognized

and repudiated by the entire Commission in another case, and finally, in still another case, by the two Commissioners composing the majority of Division 5 entering the order.

There is still another aspect of the case wherein the Commission's administration of the act lacks uniformity and is discriminatory, to the great disadvantage of appellant in furnishing transportation service to the public. Although the Commission's notice setting the case for hearing (Exhibit 2, R. 44, 145, 147) stated that in the event the evidence indicated that applicant was entitled to receive a form of authority other than that applied for such other form of authority would be granted, and applicant (appellant here) offered testimony in support of the application as a new application under section 207 (R. 55-57, 70-74), the Commission denied the application under section 207 as well as under the grandfather clause of section 206. Such denial under section 207 was entirely inconsistent with the order in *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, wherein the Commission (Division 5), while denying grandfather rights to the Missouri Pacific, with Chairman Eastman dissenting as to such denial, granted a certificate of convenience and necessity under section 207 of the act as a new operation.

A similar case is *Kansas City S. Transport Co., Inc. Com. Car. Application*, 10 M. C. C. 221, decided by Division 5 on November 12, 1938. In that particular case the denial of grandfather rights was premised primarily on the circumstance that the contract or agreement relied upon by the applicant, a wholly owned motor carrier subsidiary of the Kansas City Southern Railway, was effective subsequent to the grandfather date of June 1, 1935, specified in section 206 of the act.

The important element to note in respect of these two cases is that in each case rights were claimed by the applicant under the grandfather clause and alternatively a certificate of convenience and necessity was granted the

applicant under section 207 of the act, while equal consideration was denied appellant with respect to his application under substantially similar circumstances.

The evidence was ample to warrant granting the instant application under section 207 of the Act. And this is confirmed by the Commission's discussion on pages 301 to 303 of the report, wherein it granted appellant authority to operate as a motor carrier over four short disconnected routes, two in Wisconsin and one each in Iowa and Illinois, under Docket No. MC 42614, Sub No. 1, upon the same evidence which supported all routes alike.

The operations included in No. MC 42614, Sub No. 1, were commenced between June 1 and October 15, 1935, subsequent to the critical date of June 1, 1935, and thus were covered in what is known as an interim application, which required proof of public convenience and necessity in order to obtain a certificate, although operations were permitted to continue under the law until the application was finally disposed of by the Commission.

As shown by the report herein, the situation in MC 42614, Sub No. 1, was similar to that presented in the instant case in that the Railway obtained equipment under contracts which the Commission said were similar to the contracts discussed on page 301 of the report with respect to the grandfather application. Unlike the situation presented in the grandfather application, protestants appeared and contended that the application should be denied. The Commission observed that two of the contractors had filed no applications with the Commission and that the remaining two were motor carriers in their own right. The Commission observed further that there was no outstanding claim for authority to continue the operation other than that of applicant (appellant) and that a motor service had been rendered in the past which applicant (appellant) alone seeks authority to continue.

The situation presented in the instant case is essentially similar. This record shows no protest against the application and only one of the contractors appeared, and even he, according to statement of counsel (R. 134, 135), did not ask that the application be denied.

As this Court well knows, one of the great and fundamental purposes of Congress in enacting the Interstate Commerce Act and the Motor Carrier Act, 1935, and amendments thereto and amplifications thereof, together with other statutes regulating transportation, was to bring about uniformity in regulation, not only in respect of the public but also in respect of the carriers regulated.

In view of the circumstances outlined above, it appears clear that Division 5, notwithstanding its error as to appellant's grandfather rights, was under the legal obligation of following the procedure indicated in its notice of hearing (Exhibit 2, R. 49, 145) described above, and to grant the application upon the undisputed evidence of record and under the provisions of section 207 of the act. That notice was directly responsive to the provision in Section 206 (a), Motor Carrier Act, which after specifying the conditions under which grandfather rights should be granted gave this further direction to the Commission:

> "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a) of this part and such certificate shall be issued or denied accordingly."

This provision has been held not to place

> "a compulsion upon the Commission * * * when the applicant himself only seeks the favor of the 'grandfather clause' and makes no claim, either before the Commission or in his bill seeking to enjoin its action, to have the Commission act outside the 'grandfather clause'."

Huber v. *U. S.*, 307 U. S. 148, 156.

Such is not the case here, however.

In this proceeding before the Commission the notice of hearing specified:

> "It is further ordered: That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted." (R. 72-3, 146.)

At the hearing counsel for the applicant (appellant's predecessor as trustee) indicated that applicant was claiming the benefit of the alternative certificate on proof of convenience and necessity in the event the grandfather rights were not allowed and proof on the convenience and necessity issue was received over objections by opposing counsel. (R. 55-7, 71-4.) The presiding examiner stated at the hearing:

> "Whatever this evidence proves or tends to prove as set down for this hearing,—for hearing at this time and place, that purpose it will be considered for . . ."

The Commission's error in failing to grant the application under Section 207 was specifically alleged and relied upon in appellant's complaint in the District Court (Compl. VI, VII, X (10); R. 8-9, 13).

These circumstances differentiate this case from the *Maher Case*. While not affirmatively so holding the implication of that decision, in view of the mandatory character of the statutory provision appears clearly to support the effectiveness of the Congressional command where, as here, the benefit of it has not been waived, but has been insisted upon from the very beginning.

On the undisputed evidence a certificate of public convenience and necessity should have been granted in this case independent of the grandfather clause. The failure of the Commission to grant such a certificate or to give any consideration to that aspect of applicant's claim was in direct violation of the Congressional mandate.

The Order Deprives Appellant of Rights and Property Without Due Process of Law. It Is Based Upon a Disregard of Undisputed and Controlling Facts, Is Without Support in the Evidence and Based in Part Upon Assumed Facts Not in Evidence and Is Not Supported by Essential Findings of Fact.

(a) By Disregarding and Failing to Give Due Legal Effect to Appellant's Undisputed Showing of Bona Fide and Continuous Coordinated Motor Carrier Service the Commission Denied Appellant's Rights Without Due Process of Law.

As already pointed out Congress made a grant of rights to carriers such as appellant. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 489. *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 53. The Commission's function was limited to ascertaining the facts as to bona fide and continuous operation and it was left without any discretion to deny an application when those facts were shown to it.

The extent, character and continuity of appellant's substituted and coordinated motor carrier service as originally arranged for, effected and carried out by the Railway, were shown to the Commission without dispute. The auxiliary and supplemental nature of this more flexible service substituted in part for and coordinated with appellant's rail service and the desirable resultant promotion of economy, speed and efficiency in the handling of some 150,000,000 pounds of freight annually, all likewise appeared in the record before the Commission without any contradiction. As the details of this evidence have been set forth in the foregoing statement of the case and discussed in the preceding sections of the argument (pp. 38-42, *ante*) they need not be repeated.

We have previously pointed out how the majority of Division 5, in its report, in pursuit of an apparently pre-

conceived and completely erroneous theory as to the meaning of the statute gave consideration only to certain selected provisions of the Railway's contracts with the truckers, completely disregarded the remaining provisions thereof and the other evidence, and failed completely to consider it or give it any legal effect.

We point out here that this conduct not only violated appellant's statutory rights, as above discussed, but, as well violated rights reserved and guaranteed to appellant under the constitution.

This Court in a long line of decisions reviewing various functions and orders of the Commission under the Interstate Commerce Act and related acts consistently has held that, whenever the Commission has disregarded or failed to consider relevant evidence of an undisputed character or has denied appropriate legal effect thereto, its orders are void of any force or effect and will be set aside and vacated by the courts. As stated in *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91, "administrative orders, quasi-jurisdictional in character, are void * * * if the finding was contrary to the 'indisputable character of the evidence'." The Court at page 92 said also: "The legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission." To the same effect also is *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, 288.

In *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547, the Court, referring to the Commission's authority under the Interstate Commerce Act to regulate rates, held that an order is void

> "if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Due process of law invokes these requirements and the further requirement that the Commission give due and proper weight to all phases of the evidence having a reasonable bearing upon the issues before it. A failure to do so amounts to a denial of due process, and the courts will exercise an independent judgment as to both the law and the facts when questions of this character are raised. *Bluefield Water Works Co.* v. *Public Service Commission*, 262 U. S. 679, 689.

Again in *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, at page 525 this Court held that a carrier was entitled to present his proof and argument "before a tribunal bound not only to listen but to give legal effect to what has been established."

Disregard by the Commission of substantially uncontradicted evidence having a bearing on an issue in the case, requires the setting aside of the Commission's order even if supported by adequate findings. *Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 287-289.

In the *Chicago Junction Case*, 264 U. S. 258, 265, the Court said:

> "To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The rule is stated thus in *R. R. Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, 393,

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. * * * There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily."

To the same effect also are *St. Joseph Stock Yards* v. *U. S.*, 298 U. S. 38, 73. *Morgan* v. *United States*, 298 U. S.

468, 477; 304 U. S. 1, 14-15; and *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U. S. 292, 304.

It seems clear from the report that the majority of Division 5, based the order upon dogmatic notions and ill-founded concepts without giving any real consideration to the applicants' proof as a whole. The face of the report shows that no consideration at all was given to the more important and controlling features of the evidence. Thus appellant's predecessor was denied a fair hearing. Such a course of action justly may be characterized as arbitrary.

(b) The Conclusion in the Report That the Operations Were Those of the Contractors as Common Carriers in Their Own Right Is Based Upon Asserted Facts Outside the Record and Unsupported by Proof.

The report by the majority of Division 5 asserts (p. 301) that "on the whole" the contractors were established truckers who performed service for others than applicant who had filed applications claiming grandfather rights. The report, therefore, on its face creates the direct inference that at least some contractors were not established truckers and some contractors, not necessarily the same ones, had failed to file applications claiming grandfather rights. Consequently, even on the Commission's theory there was neither evidence nor, as will be later developed, findings of essential facts sufficient to support the denial order.

The only evidence of record on this aspect of the case is that of one of appellant's witnesses, who, in response to questioning on cross-examination as to whether any of the contractors had filed applications with the Commission under the grandfather clause, stated that although some of them had told him they had done so he did not actually know of any who had done so (See R. 97-8). The witness further testified that contractors operating three routes,

viz., 12, 13, and 14, are common motor carriers authorized to operate over the highways in Wisconsin (See R. 102-104), but he did not know whether the contractor on Route 11 was a common carrier nor did he know whether contractors as to other routes were common carriers (See R. 105, 107). None of the contractors opposed or now opposes appellant's claim for grandfather rights and none is claiming any rights for himself so far as the record shows or appellant is advised.

It seems obvious that if the contractors, or any of them, were claiming grandfather rights by reason of these same operations they would have taken an interest in this proceeding both before the Commission and in the courts. There is complete absence of any such interest or opposition. If any of them ever did file applications it seems apparent their claims have been abandoned. If the assertion in the report were correct it manifestly could be so only by virtue of information obtained from some undisclosed source outside the record. That findings or conclusions in an order lawfully may not be so supported is well settled. This Court has announced the rule in the most positive of terms that even papers in the Commission's files are not necessarily evidence in the case and *nothing can be treated as evidence which is not introduced as such.* *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, 93. *Chicago Junction Case*, 264 U. S. 258, 263. The rule has even been applied to official reports of the Commission. *Robinson v. Balt. & O. R. R.*, 222 U. S. 506, 511-512.

While the asserted circumstances of the contractors performing service for others and having filed claims for grandfather rights would not in any wise have justified or supported either the denial of appellant's application or the ultimate conclusion of the report that the motor vehicle operators in question were those of the contractors "as

common carriers by motor vehicle in their own right", it is seen nevertheless that the majority of Division 5 thought so and grounded their final conclusion and the denial order upon these assertions which were without proof or support in the record. Here, again, was a departure from the path of due process with resultant injury to appellant the remedy for which lies in the setting aside of the denial order.

(c) The Order Is Devoid of Findings Essential to Support the Erroneous Conclusion That Appellant's Motor Vehicle Service Was Being Furnished by the Contractors as Common Carriers in Their Own Right.

The report states (p. 301) that the motor vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant (appellant). This is a mere conclusion and, as already indicated, a decidedly erroneous conclusion. It is not supported by findings of fact and it is directly negatived by a statement in the preceding paragraph of the report creating the clear inference that even under the Division's theory some of the contractors could not be regarded in fact or in law as common carriers. There is no finding as to which, if any, of the contractors were common carriers by motor vehicle as defined by the Congress or even common carriers by motor vehicle under the Division's theory.

The contract provisions listed in the report and the assertion that the contractors "as a whole" were established truckers who also perform service for others can in no sense be considered as the equivalent of those findings which would have been essential to show that the contractors were common motor carriers with respect to the Railway's freight here in question. Under the statutory definition of such carriers (§ 203 (a) (14)) a basic and

essential finding would have been that these contractors were undertaking to transport this freight for the general public. Without that basic finding the conclusion that they were such common carriers is void because unsupported. This renders the order void on its face.

Two recent decisions of this Court well state the rule here applicable. For convenient reference we quote therefrom:

United States v. Carolina Carriers Corp., 315 U. S. 475, 489:

> "If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.'"

Securities and Exchange Com. v. Chenery Corp., 318 U. S. 80:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the adminis-tra-

tive agency acted be clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.' *Phelps Dodge Corp. v. National Labor Relations Bd.*, 313 U. S. 177, 197, 85 L. ed. 1271, 1284, 61 S. Ct. 845, 133 A. L. R. 1217.'"*

The findings in the instant case are vague and insufficient, as they were in those two cases. It is plainly evident that the Commission has committed the double error of ignoring both legislative standards and constitutional guaranties. Appellant's statutory rights have been "whittled away" to the vanishing point.

Conclusion.

Division 5's disregard of the congressional direction to grant certificates under the grandfather clause respecting prior transportation undertaken for the public by rail carriers through use of motor vehicles whether conducted "directly, by a lease or other arrangement," appellant believes will be apparent to the court on the face of the Division's report. Scanning the report in the light of the undisputed evidence quickly shows that evidence was, in large part and in essential aspects, disregarded, while as to the remainder it was given a strained and erroneous legal effect, for which support was sought by a statement of assumed facts outside the record. And, withal, the absence of basic findings makes the error of the Division stand out in bold relief.

The Commission's failure, upon appellant's petition for reconsideration, to correct the Division's error while con-

* The rule is thoroughly established that a Commission order to be valid must contain findings of the essential and basic facts necessary to support it. *State of Florida v. United States*, 282 U. S. 194, 215. *United States v. B. & O. R. R.*, 293 U. S. 454. *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504. *Wichita R. R. Co. v. Public Utilities Commission*, 260 U. S. 48, 59. See also, *Atchison Ry. v. United States*, 295 U. S. 193, 201, and reference therein to decisions wherein "the court has rejected the suggestion that lack of express finding by an administrative agency may be supplied by implications."

temporaneously correcting the same error in the *Boston & Maine case* and the Division's subsequent correction of its previous like error in the *Crooks Terminal case*, both involving forms of contract identical in all essential respects with those here involved, has created an anomolous situation wherein the incorrectness and error of the idea underlying the order here laid upon the appellant is fully recognized in these other cases while such recognition is here withheld.

Manifestly the Commission has administered the Act without uniformity and has grossly discriminated against appellant. The unfortunate result has left this appellant with no alternative, in the absence of appropriate corrective action by the District Court, but to pursue this appeal in order that plain rights granted to appellant under this statute and guaranteed under the Constitution may be protected for the benefit of his trust estate and with benefits of equal or even greater importance to that portion of the shipping public served by the motor carrier operations in question.

Appellant submits that the plain intent of the statutory provisions in question, the patent absence of essential findings and the obvious application of long-established and unquestioned principles of law to the undisputed facts in this case require the reversal of the District Court's decision and the setting aside of the order in question.

Respectfully submitted,

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P. F. GAULT,
Attorneys for Appellant.

APPENDIX I.

(299)

M-5785

INTERSTATE COMMERCE COMMISSION

No. MC-42614[1]

CHICAGO AND NORTH WESTERN RAILWAY COMPANY (CHARLES M. THOMSON, TRUSTEE) COMMON CARRIER APPLICATION.

Submitted April 19, 1939. Decided November 26, 1941

1. In No. MC-42614, applicant found to have failed to establish the right to a certificate under the "grandfather" clause of section 206 (a) of the Interstate Commerce Act as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between certain points in Illinois, Iowa, Nebraska, Wisconsin, Michigan, and South Dakota, over regular routes. Application denied.

2. In No. MC-42614, subnumbers 1 and 3, public convenience and necessity found to require operation, subject to certain conditions, by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, over specified routes between certain points on applicant's railway lines in Illinois, Iowa, and Wisconsin. Issuance of a cer-

1. This report also embraces No. MC-42614 (Sub-No. 1), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—Illinois, Iowa, and Wisconsin; No. MC-42614 (Sub-No. 3), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—Adams-Wisconsin Rapids; and No. MC-42614 (Sub-No. 4), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—De Kalb-Sycamore.

tificate, subject to conditions, approved upon compliance by applicant with certain requirements, and applications in all other respects denied.

3. In No. MC-42614, subnumber 4, public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and of newspapers between De Kalb and Sycamore, Ill., over specified route. Issuance of a certificate approved upon compliance by applicant with certain conditions.

P. F. Gault, *Weldon Payton*, *S. E. Gregory*, and *Llewellyn Cole* for applicant.

Earl N. Cannon, *Earl Girard*, *David Axelrod*, *Floyd F. Shields*, *Kenneth W. Munsert*, *Harry M. Slater*, *Glenn W. Stephens*, and *Roland W. Rice* for protestants.

Walter McFarland, *James A. Gillen*, *B. M. Richardson*, and *H. C. Marcusen* for interveners.

REPORT OF THE COMMISSION.

DIVISION 5, COMMISSIONERS EASTMAN, LEE, AND ROGERS

BY DIVISION 5:

In No. MC-42614, exceptions were filed by applicant to the recommended order of the examiner, protestants replied, and the parties were heard in oral argument. In (300)

No. MC-42614 (Sub-No. 1), exceptions were filed by protestants to the recommended order of the joint board, and applicant replied. No exceptions were filed to the recommended order of the joint board in No. MC-42614 (Sub-No. 3) and of the joint board in No. MC-42614 (Sub-No. 4), but we stayed the recommended orders. Our conclusions differ somewhat from those recommended in all except No. MC-42614.

In No. MC-42614, by application filed February 11, 1936, as amended, Charles M. Thomson, trustee of the property of the Chicago and North Western Railway Company,

hereinafter called the railway, of Chicago, Ill., seeks a certificate of public convenience and necessity under the "grandfather" provisions of section 206 (a) of the Interstate Commerce Act authorizing continuance of operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between a number of applicant's railway stations in Illinois, Iowa, Nebraska, Wisconsin, Michigan, and South Dakota, over specified routes. In No. MC-42614 (Sub-No. 1), by application filed February 12, 1936, as amended, the same applicant seeks similar authority to continue operations commenced between June 1 and October 15, 1935, between certain railway stations in Illinois, Iowa, and Wisconsin, over routes 1 to 4, inclusive, shown in the appendix. In No. MC-42614 (Sub-No. 3), by application filed August 2, 1937, the same applicant seeks similar authority to engage in operation between certain of the railway stations in Wisconsin over routes 5 and 6 as shown in the appendix. In No. MC-42614 (Sub-No. 4), by application filed October 25, 1937, as amended, the same applicant seeks similar authority to engage in the transportation of general commodities consisting entirely of express and newspapers between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix. A number of motor carriers and motor-carrier associations oppose the applications other than No. MC-42614 (Sub-No. 4). The Chicago, Burlington & Quincy Railroad Company intervened in No. MC-42614, and the Iowa Commerce Commission and Iowa Freight Lines, Inc., intervened in No. MC-42614 (Sub-No. 1).

All the applications involve transportation by motor vehicle between applicant's railway stations in rendering a service which is or will be auxiliary to or supplemental of and coordinated with the railway service. Except in the case of express matter, all of the operations relate to traffic obtained by applicant, moving at applicant's rail rates, and under rail billing. Express matter will move under ap-

(391)

plicant's outstanding contract and established arrangements with the Railway Express Agency, Inc., at rates provided for in the latter's published tariffs.

No. MC-42614.—The motor-vehicle operations involved in

this application were commenced prior to June 1, 1935, but at all times have been performed by others, hereinafter referred to as the contractors, under contract with applicant. Applicant does not operate motor vehicles either as owner or under lease or any other equivalent arrangement. On the whole, the contractors were established truckers selected by applicant to perform the service and who perform service for others than applicant and have filed applications claiming "grandfather" rights thereto.

Copies of existing contracts were submitted in evidence. They are so framed as to impose upon the contractors, and not applicant, the obligations ordinarily assumed by common carriers by motor vehicle. They provide, among other things, that the contractor shall furnish the motor vehicles, operate them in the contractor's own name, and not display applicant's name on them; that the contractor shall employ, direct, and control the drivers; that the contractor shall assume the status of an independent contractor; that the contractor's liability for the freight while in his possession shall be that of an insurer; that the contractor shall comply with all State and Federal regulations; and that the contractor shall protect, indemnify, and save applicant harmless against any and all loss and damage by reason of the operation, and shall also authorize applicant to carry insurance protecting him against any claims whatsoever arising out of the contractor's operations and to deduct from the latter's compensation the approximate cost of such insurance. These, as well as other provisions in the contracts, establish that the motor vehicles are to be supplied by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant. See *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M. C. C. 405. It follows that the application must be denied.

No. MC-42614 (Sub-No. 1).—This application covers operations commenced between June 1 and October 15, 1935, over four short, disconnected routes—two in Wisconsin and one each in Iowa and Illinois—performed by four

contractors under contracts with the railway similar to those previously discussed. The joint board recommended that a certificate be granted. There is no question that applicant is fit, willing, and able properly to perform the service.

Protestants contend that applicant failed to show that (302)

public convenience and necessity require the service, in that no shipper witness testified in support of the application and applicant made no attempt to show that the existing motor-carrier service is inadequate. On the other hand, they assert that such service will affect the operations of existing motor carriers, and that applicant has made no attempt to secure coordinated rail and motor-carrier service with the existing motor carriers. They urge that the joint board failed to give proper consideration to the service of existing motor carriers, and they take exception to the statement of the joint board that the status of the independent contractors is not here in issue.

None of the contractors has filed applications predicated upon the operations performed under contract with the railway. Two have filed no applications with this Commission. The other two are motor carriers in their own right. One filed a "grandfather" application and has been issued an order authorizing continuance of such operations. The other has been issued a certificate of registration. Both were engaged in motor-vehicle operations beyond, and prior to the commencement of, the operations here in question. There is therefore no outstanding claim for authority to continue the operations in question, other than that of applicant, and the status of the contractor is not here in issue nor do they oppose the application. This is not to say that the operations in question have been conducted in the past by applicant as a motor carrier. It is to say, however, that a motor-vehicle service has been rendered in the past which applicant alone seeks authority to continue. The question is whether public convenience and necessity require continuance of such service by applicant, and, if so, whether appropriate authority should be granted; but, as protestants point out, if applicant contemplates conducting the operations by means of equipment owned by others, the operation of such equipment

must necessarily be under applicant's direction and control and under his full responsibility to the general public as well as to the shippers. See *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321.

The motor-vehicle service which has been conducted in the past, and which applicant seeks authority to continue, is auxiliary to and supplemental of applicant's railway service in the handling of less-than-carload traffic. This service is coordinated with the railway service and, in addition to movement by motor vehicle, involves a prior or subsequent movement by rail. While no shipper testimony was presented, the evidence clearly shows that these operations have resulted and will continue to result in operating economies as well as a better and more frequent and efficient service to shippers. We are of the opinion that such coordinated service is distinctly in the public interest. Applicant does not seek to enter a new field of service (303)

but to continue a more efficient means of service than that afforded by all-rail service. It is confined strictly to rail points now served by applicant, and its continuance will not restrain competition.

It does not follow, however, that public convenience and necessity require motor-vehicle service by applicant without limitation as recommended by the joint board. The record warrants the conclusion that the services to be authorized are those which are auxiliary to, supplemental of, and coordinated with that of the railway, and the certificate herein granted covering such operations will be limited accordingly. On the whole, the facts and contentions here presented are not materially different from those considered and passed upon in the case hereinbefore cited and wherein limitations similar to those contained in our findings below were likewise provided.

No. MC-42611 (Sub-No. 3).—By this application, authority is sought to operate as a common carrier by motor vehicle of general commodities between applicant's rail stations of Wisconsin Rapids, Port Edwards, Nekoosa, and Adams, Wis., over routes 5 and 6 as shown in the appendix.

Wisconsin Rapids is on a long branch line extending

northwesterly from Fond du Lac to Marshfield, Wis. Port Edwards and Nekoosa are on a short branch line out of Wisconsin Rapids; and Adams, directly south of these points, is on the main line which extends northwesterly from Milwaukee, Wis., and Chicago to Minneapolis and St. Paul, Minn., and which parallels the long branch line. Adams, industrially unimportant, is a divisional terminal point, and the other points form an important industrial district. Over applicant's rail lines the average distance between Adams and the other points is 211 miles, but over the proposed cross-country highway routes, which would link the parallels, the average distance is only 32 miles.

Intrastate operations were inaugurated over these routes in July 1937 under authority granted applicant by the Public Service Commission of Wisconsin. The local intrastate traffic between Adams and the other points has never been more than negligible, and the operation is not being established to handle this traffic, but to handle, by rail to and from Adams and by truck beyond, traffic between more distant intrastate and interstate points, such as Milwaukee and Chicago, and Wisconsin Rapids, Port Edwards, and Nekoosa.

The proposed interstate motor-vehicle operations would be supplementary to rail operations (which would be continued) and would enable applicant to offer shipping patrons the benefits of a coordinated rail-motor service with its advantages of greater flexibility and frequency of movement and, coincidentally, to effect certain economies of operation. Service would be confined to less (304)

than-carload traffic. Traffic from Milwaukee to Wisconsin Rapids furnishes an example of the advantages and economies of the operation. By means of rail-truck service, intrastate merchandise traffic leaving Milwaukee at 11:45 p. m. arrives at Wisconsin Rapids at 9 a. m. the following day, whereas interstate traffic, leaving Milwaukee at the same time, does not arrive at Wisconsin Rapids until 7 a. m. the second day. The extension of the coordinated service to interstate traffic would cut present schedules 22 hours and would enable applicant to dispense with two schedule cars each day, resulting in a saving of 487 car-

miles per day. Traffic from Chicago would likewise be affected advantageously to shippers and to applicant.

There is no doubt that the proposed service is in the public interest. It is not competitive with applicant's rail service but is auxiliary to, supplemental of, and coordinated with such service. Except for the short distance along the branch line between Wisconsin Rapids and Nekoosa, the highways to be traversed do not parallel applicant's rail lines but connect paralleling rail lines. However, there is nothing to indicate that the proposed service would invade territory of any other rail carrier. Nor does it appear that the proposed service would affect the operations of existing motor carriers in the territory or unduly restrain competition. The amount and extent of existing motor-carrier service is not shown of record. However, the proposed service is strictly confined to rail points in Wisconsin now served by applicant, and all interstate traffic will originate at or be destined to points beyond, move on rail billing, and involve, in addition to movement by motor vehicle, a prior or subsequent movement by rail.

As before stated, no exceptions were filed to the recommended order of the joint board, but we stayed the recommended order. The joint board recommended the granting of authority without limitation. The operations, however, will be limited to those which are auxiliary to, supplemental of, and coordinated with the rail service, and the authority hereinafter granted will, accordingly, be so limited.

No. MC-12614 (Sub-No. 4).—By this application, authority is sought to engage in operation as a common carrier by motor vehicle, in interstate or foreign commerce, in the transportation of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and newspapers, between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix.

Applicant operates a main rail line from Chicago through De Kalb to Clinton, Ill., and beyond. Sycamore is on a branch line of applicant's railway 5.3 miles northwest of De Kalb. The distance between Sycamore and De Kalb

over Illinois Highway 23 is 6 miles. The proposed interstate operation by motor vehicle would expedite, facili- (305)

tate, and render more economical and efficient transportation of such express and newspapers between Sycamore, on the one hand, and De Kalb, Chicago, and other Illinois points, on the other, and also between Sycamore and points in other States in connection with applicant's service to and from De Kalb. The proposed operation would render service much less expensive to the railway and would benefit shippers by making it possible to have more frequent service than otherwise could be rendered, since connection can be made with frequent train service to and from De Kalb. As before stated, the express will move under applicant's outstanding contracts and established arrangements with the Railway Express Agency, Inc., at rates provided for in the latter's published tariffs.

Prior to September 26, 1937, applicant received numerous requests from patrons in towns west of De Kalb, such as Dickson, Sterling, and Morrison, for an earlier evening passenger-train service. Prior to that date the passenger train left Chicago and moved to Sycamore by way of De Kalb and then returned to De Kalb. In order to give the towns west of De Kalb earlier service it was necessary for applicant to extend service to Clinton, Iowa. Giving service to Sycamore costs approximately $941 per month. Sycamore has a population of 4,800 persons, and a number of industries located there use express service to a considerable extent both as to in-bound and out-bound movements. Residents of Sycamore complained bitterly when they thought applicant was going to cease operations inso far as express and newspapers were concerned. They desired the same service as they had prior to September 26, 1937, and the purpose of the proposed operation is to meet this demand and public requirement at less expense to applicant. The joint board recommended that a certificate be granted applicant authorizing transportation of mail, newspapers, and express. At the hearing, however, applicant amended the application to include only express and newspapers. The application is unopposed, and the proposed service is clearly in the public interest.

In general.—There is no question that application is fit,

willing, and able properly to perform the proposed service requested in Nos. MC-42614, subnumbers 1, 3 and 4. As before stated, operations involved in No. MC-42614 (Sub-No. 1) are being performed by others under contract with applicant. The record also indicates that applicant is undetermined whether to acquire motor vehicles of his own or utilize equipment of others. If applicant contemplates conducting the operations herein authorized by means of equipment owned by others, the operation of such equipment must be under applicant's direction and control and under his responsibility to the general public as well as to the shippers. See *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M. C. C. 735.

(306)

Findings.—In No. MC-42614, we find that applicant has not shown that he was in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between the points and over the routes requested on June 1, 1935, and continuously since; that applicant has failed to establish that he is entitled to a certificate under the "grandfather" clause of section 206 (a) of the act; and that the application should be denied.

In No. MC-42614 (Sub-No. 4), we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and of newspapers, between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; and that a certificate authorizing such operations should be granted.

In Nos. MC-42614, subnumbers 1 and 3, we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle of general commodities, in interstate or foreign commerce, between the points and over the highways shown

in the appendix, routes 1 to 6, inclusive, subject to the following conditions:

1. The service by motor vehicle to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Chicago and North Western Railway Company, hereinafter called the railway.

2. Applicant shall not serve, or interchange traffic at, any point not a station on a rail line of the railway.

3. Shipments transported by applicant shall be limited to those which move under a through bill of lading covering, in addition to movement by applicant by motor vehicle, a prior or subsequent movement by rail.

4. Such further specific conditions as we, in the future may find it necessary to impose in order to restrict applicant's operations by motor vehicle to service which is auxiliary to, or supplemental of, the rail service of the railway.

We further find that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the applications in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, appropriate certificates will be issued.

(307)

An order will be entered denying the applications except to the extent that operations are authorized herein.

EASTMAN, *Commissioner*, concurring in part:

I approve the conclusions which have been reached, except that I am of the view that the "grandfather" application should be granted rather than denied. The reasons for this view of the matter are substantially those which I expressed in a separate opinion in *Missouri Pacific R. Co. Common Carrier Application*, *supra*, pages 333-6. With respect to the conditions which are imposed in subnumbers 1 and 3, I would not ordinarily approve the one which is numbered 3, for the reasons indicated in *Kansas City S.*

Transport Co., Inc., Com. Car Application, 28 M. C. C. 5. In the circumstances here presented, however, this condition is not objectionable.

APPENDIX

Authority granted

Route 1. Between Sterling and Union Grove, Ill., over U. S. Highway 330 to the junction of U. S. Highway 30, thence over U. S. Highway 30 to Union Grove, serving the intermediate and off-route points of Round Grove, Morrison, Galt, and Agnew, Ill.

Route 2. Between Stanwood and Tipton, Iowa, over Iowa Highway 38.

Route 3. Between Manitowoc and Two Rivers, Wis., over Wisconsin Highway 42.

Route 4. Between Madison and Beloit, Wis., over U. S. Highway 14 to Janesville, Wis., thence over U. S. Highway 51 to Beloit, serving the intermediate points of Oregon, Evansville, and Janesville, and the off-route point of Brooklyn, Wis.

Route 5. Between Wisconsin Rapids and Adams, Wis., over Wisconsin Highway 13.

Route 6. Between Wisconsin Rapids, and Adams, Wis., over Wisconsin Highway 54 between Wisconsin Rapids and Port Edwards, thence over Wisconsin Highway 73 via Nekoosa to the junction of said highway with Wisconsin Highway 13, thence over Wisconsin Highway 13 to Adams, serving the intermediate points of Port Edwards and Nekoosa, Wis.

Route 7. Between De Kalb and Sycamore, Ill., over Illinois Highway 23.

ORDER.

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 26th day of November, A. D. 1941.

No. MC-42614.

Chicago and North Western Railway Company
(Charles M. Thomson, Trustee)
Common Carrier Application.

No. MC-42614 (Sub.-No. 1)

Chicago and North Western Railway Company
(Charles M. Thomson, Trustee)
Extension of Operations—Illinois, Iowa, and Wisconsin

No. MC-42614 (Sub-No. 3)

Chicago and North Western Railway Company
(Charles M. Thomson, Trustee)
Extension of Operations—Adams-Wisconsin Rapids

No. MC-42614 (Sub.-No. 4)

Chicago and North Western Railway Company.
(Charles M. Thomson, Trustee)
Extension of Operations—De Kalb-Sycamore.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof;

It is ordered, That the said applications, except to the extent granted in said report, be, and they are hereby denied, effective December 31, 1941.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(SEAL)

APPENDIX II.

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION.

No. MC-75872.[1]

BOSTON & MAINE TANSPORTATION COMPANY COMMON CARRIER APPLICATION.

Submitted March 9, 1943. Decided August 27, 1943.

1. Upon further hearing, findings in original report, 30 M. C. C. 697, to the extent reopened, reversed. Other report in 34 M. C. C. 599.

2. Boston & Maine Transportation Company found entitled to continue operations as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with exceptions, between specified points in Massachusetts and New Hampshire, over regular routes, by reason of having been so engaged on June 1, 1935, and continuously since. In Nos. MC-75872 and MC-75871, issuance of an appropriate certificate approved upon compliance by applicant with certain conditions, and applications, to the extent reopened, denied in all other respects. No. MC-15934, to the extent reopened, dismissed at applicant's request.

W. A. Cole and *R. M. Hall* for applicants.

Robert W. Upton, John H. Sanders, and *Oliver C. Peterson* for protestants.

1. This report also embraces No. MC-75871, Boston & Maine Transportation Company Contract Carrier Application, and No. MC-15934, Boston and Maine Railroad Common Carrier Application, to the extent reopened

REPORT OF THE COMMISSION ON FURTHER HEARING.

DIVISION 5, COMMISSIONERS LEE, ROGERS, AND PATTERSON.

BY DIVISION 5:

Exceptions were filed by New Hampshire Truck Owners' Association and New Hampshire Motor Rate Bureau, Inc., to the recommended order of the examiner on further hearing, and applicants replied.

In the original report herein, 30 M.C.C. 697,[2] division 5, among other things, considered the claims of the Boston & Maine Transportation Company, the Boston and Maine Railroad, and Big Three, Inc., all of Boston, Mass., hereinafter called the transportation company, the railroad, and Big Three, respectively, to "grandfather" rights as common or contract carriers by motor vehicles, or both, of general commodities, with exceptions, between points in Maine, New Hampshire, Vermont, Massachusetts, and New York, over regular routes, with respect to traffic moving on the billing of the transportation company and on the billing of the railroad, but which traffic was carried in vehicles owned and operated by Big Three, N. F. Smith & Co., of Lowell, Mass.,[3] hereinafter called Smith & Co., and other motor carriers.

Division 5, among other things, found that neither the transportation company nor the railroad had established that on June 1 or July 1, 1935, as the case may be, it was in bona fide operation as a common carrier or as a contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points and over the routes described in the respective applications; that Big Three was on June 1, 1935, and continuously

2. The original report and the report on reargument also included No. MC-30377, Big Three, Inc., Common Carrier Application; No. MC-30376, Big Three, Inc., Contract Carrier Application; No. MC-75871 (Sub-No. 1), Boston & Maine Transportation Company Extension of Operations and No. MC-15934 (Sub-No. 14), Boston and Maine Railroad Extension of Operations and those shown in footnote 1.

3. In *Smith and Particle Common Carrier Application*, 31 M.C.C. 735, division 5 found, among other things, that applicants were entitled to a certificate as a common carrier by motor vehicle in respect of regular-route operations which they had conducted for the transportation company on June 1, 1935, and continuously since. Subsequently, however, as hereinafter explained, this application was dismissed.

since, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with certain exceptions, between specified points in Massachusetts, over regular routes; and that a certificate authorizing the continuance of such operations should be granted. The division further found that the applications of the transportation company and of the railroad should be denied, and that the Big Three applications should be denied, except to the extent a certificate was granted. An appropriate order was entered.

Upon petition of the transportation company and the railroad, all of the proceedings involved in the original report were reopened for reargument and reconsideration and the denial order was vacated and set aside.

In the report on reargument, 34 M. C. C. 599, the Commission, after fully discussing and considering the claims of the transportation company, the railroad, and Big Three, concluded, among other things, that Congress, under the "grandfather" clauses of sections 206(a) and 209(a) of the Interstate Commerce Act, did not intend to grant multiple "grandfather" rights either as common carriers or common and contract carriers on the basis of a single transportation service. The Commission also approved the general principle announced by division 5 in *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M. C. C. 735, for determining the claim of an applicant that it was a common carrier by motor vehicle as defined in section 203(a)(14) with respect to traffic which was carried in vehicles owned and operated by others. In the last cited case division 5 held that if the vehicles of the owner-operators, while being used by applicant, were operated under its direction and control, and under its responsibility to the general public as well as the shipper, then the operations in which such vehicles were employed came within the phrase "or by a lease or any other arrangement" of section 203(a)(14), and applicant, as to such operations, was a common carrier by motor vehicle. On the facts before the Commission relative to the operations of transportation company, the railroad, and Big Three, the Commission concluded that the transportation company was a common carrier by motor vehicle with respect to traffic moving on its billing and on the billing of the rail-

road, which traffic was carried in vehicles owned by Big Three, with whom the transportation company had a written contract, but that as to the traffic which was carried in vehicles owned and operated by other motor carriers, except Smith & Co., under oral agreements with the transportation company, the latter was not a common carrier by motor vehicle.

In view of the above conclusion, the Commission, among other things, found in Nos. MC-75872, and MC-75871 (1) that the transportation company was on June 1, 1935, and continuously since that time has been, in bona fide operation as a common carrier by motor vehicle, of general commodities, with certain exceptions, between points in Massachusetts, Maine, and New Hampshire, over 27 regular routes described in Appendix A to that report; that a certificate authorizing continuance of such operations should be granted; and that the above-numbered applications, except to the extent that they were reopened therein for further hearing, should be denied; (2) that in No. MC-15934, the railroad had not established that on June 1, 1935, or July 1, 1935, as the case may be, it was in bona fide operation as a common carrier or as a contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points and over the routes described in its application, as amended, and that its application for a certificate or permit under the "grandfather" clause of sections 206(a) and 209(a) of the act, except to the extent that it was reopened therein for further hearing, should be denied.

No finding was made in the report on reargument as to the rights claimed by the transportation company or the railroad by reason of the transportation of shipments moving on their billing which were carried in vehicles owned by Smith & Co., because, as pointed out in the report, the facts presented in the proceeding relative to the applications of the transportation company and the railroad with respect to the agreement existing on June 1, 1935, between the transportation company and Smith & Co., and the manner in which the vehicles owned by the latter were employed by the former in transporting freight moving on the billing of the transportation company and the railroad were not in harmony with the facts presented in the

proceeding relative to Smith & Co. application No. MC-32585. In view thereof, Nos. MC-75872, MC-75871, and MC-15934, were reopened for further hearing, solely for the purpose of receiving evidence as to the agreement in effect on June 1, 1935, and continuously since that date to the date of the further hearing, and as to the manner in which the vehicles owned by Smith & Co. were employed by the transportation company to transport freight moving on the billing of the latter and the railroad. Contemporaneously therewith, an order was entered reopening for further hearing on a consolidated record with the above-numbered cases the Smith & Co. proceeding for the purpose of receiving similar evidence and for the purpose of receiving further evidence respecting the continuity of operation from June 1, 1935, to the date of the further hearing by Smith & Co., as a common carrier by motor vehicle, of the commodities and over the regular routes for which a certificate is sought under the "grandfather" clause of section 206(a) of the act.

On further hearing applicants in Nos. MC-75872, MC-75871, and MC-15934, appeared but applicants in No. MC-32585, did not appear, nor did any one appear in their behalf. Subsequently, at the request of applicants in No. MC-32585, the application was dismissed on November 12, 1942. New Hampshire Truck Owners' Association and New Hampshire Motor Rate Bureau, Inc., opposed applications Nos. MC-75872, MC-75871, and MC-15934 to the extent reopened but submitted no evidence. At the further hearing the railroad withdrew its application No. MC-15934, as reopened. It will, therefore, be dismissed.

The history and operations of the transportation company and the railroad are described in the report on reargument, and need not be repeated. It is sufficient to state that the transportation company is a wholly-owned subsidiary of the railroad. It was incorporated in 1924, and in 1925 commenced soliciting freight from the general public for its account, holding itself out as a common carrier by motor vehicle of general commodities, with certain exceptions, between points in Maine, New Hampshire, Vermont, and Massachusetts, over numerous regular routes. Since 1925, it has, by written contract with the railroad, provided motor truck service in substitution for

rail service for the transportation of general commodities, with certain exceptions, (1) in transfer service within the terminal areas of the railroad at various cities in the above-named States, and (2) in line-haul service between points in the above-named States, over numerous regular routes. The transportation company was registered under the code of fair competition for the trucking industry in 1934, and since prior to June 1, 1935, it has had appropriate State authority to engage in intrastate and interstate commerce over all routes in Massachusetts and Vermont, and with a minor exception in Maine. In 1934 and 1935, it also had certain trucks registered in its name in New Hampshire as a contract carrier for services between certain points and over certain routes.

Prior to January 1, 1936, the transportation company did not own any motor trucks, and all the traffic moving on its billing and on the billing of the railroad was carried in vehicles owned by other motor carriers, including Smith & Co. On June 1, 1935, the traffic moving on the billing of the transportation company and on the billing of the railroad between the points and over the routes described in the appendix hereto, was carried in vehicles owned by Smith & Co. The transportation company contends it is entitled to a certificate as a common carrier by motor vehicle under the "grandfather" clause of section 206(a) to continue such operations.

When the transportation company commenced operations in 1925, it utilized the vehicles of other motor carriers between the points herein considered. It first used Smith & Co. vehicles in 1925, to provide local service within the cities of Lowell and Lawrence, Mass. Sometime during the same year it also used the vehicles of Smith & Co. between certain points herein considered, and later between other points. Both the local and over-the-road service performed by Smith & Co. were originally performed pursuant to written contracts entered into in 1925, and such written contracts provided terms and conditions similar to the terms and conditions contained in the contract between the transportation company and Big Three, which is set forth in the report on reargument. After 1927, all the service provided by Smith & Co. was performed pursuant to oral agreements until November 9, 1937, when Smith & Co. en-

tered into a bilateral contract with the transportation company. Therefore, on June 1, 1935, no written contract was in effect between the transportation company and Smith & Co., and all service rendered by Smith & Co. was performed pursuant to oral agreements.

In the report on reargument the Commission said:

> * * * The principle announced in the *Dixie Ohio case* has been applied in cases too numerous to cite, involving not only "grandfather" rights but also new operations, and in which, in many instances, petitions for reconsideration have been denied by us.
>
> Although indirectly we have approved the above-described principle, it should be pointed out that for the purposes of regulation in cases involving the utilization by a motor carrier of vehicles which it does not own, with or without the services of the owner, or his representative, we must have an answer to the question: "Who is, in legal contemplation, the operator of the truck?" Consequently, the question considered in the *Dixie Ohio case* remains, and we see no reason to depart from the general principle announced therein. It must be noted, however, that the words "direction," "control," and "responsibility" are conclusions dependent upon the facts presented in each individual case. The question cannot be decided by the existence of any single factor such as the name used on bills of lading or displayed on the vehicle, the method of payment for the service performed, or the terms of the agreement between the parties. The answer depends on a full consideration of all of the conditions connected with the transportation service. * * *

Consideration must be given to all of the conditions connected with the transportation service insofar as they tend to establish "direction," "control," and "responsibility" over the operations.

As previously stated, operations between the points herein considered were commenced by the transportation company in 1925, and the vehicles of Smith & Co. were used to transport traffic moving on the billing of the transportation company and the railroad between certain points, and subsequently between other points. On June 1, 1935, the

vehicles of Smith & Co. were used on all of the routes. Smith & Co., however, never operated between the considered points prior to the utilization of their vehicles by the transportation company, and since then, with minor exceptions in 1941, have not transported any traffic moving on their own billing between such points. All shipments moving over such routes have been solicited in the name of the transportation company or the railroad and have been carried under their billing and rates. Smith & Co., collected the freight charges accruing on such shipments and remitted the total amount of such charges to the transportation company or to an agent of the railroad. The transportation company or the railroad has assumed full responsibility to the shippers for the safe transportation of all shipments and the shippers have looked to them for settlement of claims, adjustment of rates, extension of credit, and diversion of shipments. Occasionally Smith & Co., have paid claims in the first instance; have extended credit to shippers for the payment of freight charges on their own responsibility; and have diverted shipments upon instructions from the shippers. However, under the usual practice, claims for loss and damage have been paid either directly by the railroad or by it as agent for the transportation company, and the transportation company in turn has obtained reimbursement in whole or in part from Smith & Co., when they were determined to be at fault. Smith & Co., were compensated for over-the-road service on a mileage and hourly basis from 1925 to 1929, on a tonnage basis from 1929 to December 1936, on a mileage basis from December 1936 to September 1, 1941, and thereafter on a tonnage basis.

In 1934, and in each succeeding year, the transportation company has obtained common-carrier and contract-carrier plates in Massachusetts and contract-carrier plates in New Hampshire, which were displayed on Smith & Co. vehicles. Smith & Co. obtained a contract-carrier permit authorizing operation throughout Massachusetts and also a common-carrier certificate, which, however, was restricted to operations between points in the cities of Lowell and Lawrence, and between Lowell and North Chelmsford, Mass., a suburb of Lowell. There is no evidence that Smith & Co., ever had authority to operate in New Hampshire. The

transportation company, since it commenced operations, has provided common-carrier rates covering all classes of traffic between the considered points and, effective April 1, 1936, filed such rates with this Commission. There is no evidence that Smith & Co., ever provided common-carrier rates applicable on all classes of traffic between the considered points, although it did publish, effective May 13, 1937, a distance scale of common-carrier rates which could have been applied on certain traffic between Boston and other points shown in the appendix. On June 1, 1935, Smith & Co., owned 52 units of equipment. All except three of their freight-carrying vehicles bear the name of the transportation company on the sides and their own trade name on the hood, as required by the Massachusetts authorities. When the vehicles were used to carry the traffic of the transportation company or the railroad, they were used exclusively for that purpose.

Under the oral agreement in effect on June 1, 1935, between the transportation company and Smith & Co., the latter, among other things, agreed to furnish the necessary vehicles to carry the traffic of the transportation company and the railroad, and that they would not compete with the transportation company or the railroad over the routes where they were transporting traffic moving on the billing of the transportation company or the railroad.

Considering this evidence, the conclusion is warranted that, between the points and over the routes herein considered, Smith & Co. did not hold out to the general public and that they did not intend to engage nor in fact did they engage in providing a transportation service as a common carrier for the general public, but rather that they were engaged in furnishing motor vehicle equipment to a motor common carrier, and in operating that equipment in its service.

That the transportation company exercised direction and control over the vehicles of Smith & Co. is indicated by the testimony of the witness for the transportation company, who testified that, through its employees, the movement of the vehicles of Smith & Co. was subject to the direction of the transportation company. The latter prescribed the type of vehicles to be used, the routes and points to be served, the time the vehicles were to be oper-

ated, and where the vehicles were to go at the conclusion of the trip. Certain of the equipment and employees of Smith & Co. were regularly assigned to certain operations, while others were called for by dispatchers of the transportation company when needed. Since prior to June 1, 1935, the transportation company has had employees at its Boston terminal and at a steamship pier in Boston, as well as at Lawrence. Shortly after the statutory date the transportation company also had an employee at Lowell. Although Smith & Co., since prior to the statutory date, has had employees at Lawrence and Lowell and also at the steamship pier in Boston, the transportation company gave those employees directions as to when or where trucks were needed and any day-to-day variations in the traffic and service which Smith & Co. were required to meet. Upon delivery of a load at Boston, other than at the steamship pier, the drivers of Smith & Co. vehicles contacted the transportation company dispatcher at Boston for orders as to their return loads.

So far as the responsibility "to the shipper" is concerned, it is clear that the transportation company and the railroad assumed full responsibility. Claims for loss or damage were filed against the transportation company or the railroad, and such claims were paid by the transportation company. Although the transportation company or the railroad collected from Smith & Co. for any loss or damage to shipments while in their possession, this did not in any way shift from the transportation company or the railroad to Smith & Co. the responsibility to the shipper; it was merely an arrangement enabling the transportation company and the railroad to obtain from Smith & Co. reimbursement for any payments arising under the former's responsibility to the shipper, and for which the latter was responsible to the transportation company or the railroad.

The question boils down, therefore, to one of whether the vehicles owned by Smith & Co. which were utilized by the transportation company were operated under the latter's obligation "to the general public". As pointed out in the report on reargument, prior to June 1, 1935, there was no Federal law relating to the responsibility to the general public of a person which held itself out to the

general public as a common carrier by motor vehicle, and no doubt the responsibility of such a person for loss of life, personal injury, or property damage caused by the operations of vehicles on the public highways or otherwise was determinable under State statutes or at common law.

Whether the transportation company could have been held responsible, and, if so, to what extent and degree, for loss of life, personal injury, or property damage caused by the operations of the vehicles on the public highways cannot be determined from this record. However, it clearly appears that the transportation company was apprehensive that it might be held to such responsibility, for its witness testified that under the oral agreement in effect on June 1, 1935, with Smith & Co., the latter were required, among other things, to provide public liability and property insurance and to furnish a bond of indemnity saving harmless the transportation company and the railroad for any suits or claims against them arising from the operation of any of the Smith & Co. vehicles.

The examiner concluded that the operations of Smith & Co., as described, in law were the operations of the transportation company, and that the latter, as to such traffic, was on June 1, 1935, a common carrier by motor vehicle, as defined in section 203(a)(14) of the act, and found that the transportation company was entitled to a certificate authorizing continuance of such operations.

Protestants in their exceptions assert that in legal contemplation the transportation company was not, and Smith & Co. was, the operator of the vehicles carrying traffic moving on the billing of the transportation company and the railroad; that the transportation company under the law and the facts was not a common carrier by motor vehicle as to the operations conducted by Smith & Co.; and that it is not entitled to a certificate authorizing continuance thereof.

As stated in the report on reargument, certain evidence of record in the previous hearings in the applications of the transportation company, the railroad, and Smith & Co. was not in harmony. The further hearing was ordered for the purpose of obtaining a clarification of the record respecting Smith & Co.'s operations. As hereinafter

before stated, Smith & Co. did not appear at the further hearing, and therefore no evidence was submitted on their behalf. The testimony of the witness for the transportation company and the railroad was not contradicted. We have carefully examined the entire record in the proceedings as to the operations covered by these applications and concerned in the further hearing. We are satisfied that the evidence in the further hearing has clarified the record as to the limited matters involved therein; that the facts, as established by the evidence of record, are as stated herein; and that there is no merit to protestants' exceptions.

In consideration of all the facts, we conclude that, with respect to traffic moving on the billing of the transportation company and of the railroad, the operations of Smith & Co. were in law the operations of the transportation company, and that the latter, as to such traffic, was on June 1, 1935, and since has been, a common carrier by motor vehicle as defined in section 203(a)(14) of the act.

Since January 1, 1936, the transportation company has discontinued using the vehicles of Smith & Co. on certain routes, and in place thereof instituted physical operations with vehicles leased from the railroad. Also, because of load restrictions imposed by orders of the Office of Defense Transportation, it has discontinued service between certain points. However, in the latter case it has no intention of abandoning operations and intends to resume operations whenever the amount of traffic is sufficient to use its own vehicles for such service.

On the authority of the decision of the entire Commission in *Boston & Maine Transportation Company Common Carrier Application*, 34 M. C. C. 599, on further hearing, we find in Nos. MC 75872 and MC 75871, as reopened, that the Boston & Maine Transportation Company was on June 1, 1935, and continuously since has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, and commodities in bulk, between the points and over the regular routes described in the appendix hereto, serving all intermediate

points, and the off-route points specified; that applicant is entitled to a certificate of public convenience and necessity authorizing continuance of such operations; and that in all other respects the above-numbered applications, to the extent reopened, except to the extent granted herein, should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the Interstate Commerce Act, and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the applications in Nos. MC-75872 and MC-75871 to the extent reopened, except to the extent granted herein, and dismissing the application in No. MC-15934.

(Routes and Order omitted in printing.)